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B E T W E E N:

FEDERAL COURT

CANADIAN CIVIL LIBERTIES ASSOCIATION

Applicant
(Moving Party)

and

ATTORNEY GENERAL OF CANADA

Respondent
(Responding Party)

RESPONDING MOTION RECORD OF THE ATTORNEY GENERAL OF CANADA
Applicant's Motion regarding Rule 317 Record and s. 39 of the
Canada Evidence Act

June 29, 2022

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FEDERAL COURT

B E T W E E N:

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Applicant
(Moving Party)

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**WRITTEN REPRESENTATIONS OF THE RESPONDENTS,
THE ATTORNEY GENERAL OF CANADA**

**Applicant's Motion regarding Rule 317 Record and s. 39 of the
*Canada Evidence Act***

June 29, 2022

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OVERVIEW

1. The main issue in this motion is focused on whether the Incident Response Group is a committee of Cabinet for the purpose of applying s. 39 of the *Canada Evidence Act*.¹
2. The protection offered to information through s. 39 of the *CEA* is not limited strictly to information relating to “full” Cabinet discussions and deliberations. The very nature of Cabinet requires that sub committees of Cabinet be struck in order to review specific matters in detail. Similarly, the presence of individuals who are not members of Cabinet, in particular members of the public service, does not in any way diminish the protection afforded to information discussed at these meetings.
3. If the CCLA’s position is accepted, the protection of s. 39 will be reduced to the point that it will be incapable of fostering the collegial, vigorous and frank discussions that are central to a well functioning Cabinet discussion. Consequently, the role that Cabinet plays in government as a whole will also be eroded.

PART I – FACTS AND LEGISLATION

4. The general background facts are set out in the factum of the CCLA.
5. The AGC’s fact affiant, Steven Shragge, is a Senior Policy advisor with the Privy Council Office’s (PCO) Security and Intelligence Secretariat. He is a witness of facts within his knowledge, not a Crown deponent provided to give answers on behalf of the

¹ *Canada Evidence Act*, RSC 1985, c. C-5, at s 39. [CEA]

AGC as a party. Mr. Shragge works on national security issues.² The support he provides to the Cabinet process is limited to the national security files that he is responsible for monitoring. This may include developing briefing material, coordinating with other government departments to identify strategic issues, and collating advice for the Cabinet process.³ His operational knowledge of the decision-making and coordination structures is through his role and perspective as a policy analyst, and not that of a machinery of government expert. Given this, many of his responses in relation to the interaction between the Incident Response Group (IRG) and other Cabinet structures were appropriately qualified.⁴

6. In describing the IRG during the May 19, 2022 cross-examination, including its membership and mandate, Mr. Shragge relied on and referred to the Prime Minister's website on Cabinet Committee Mandate and Membership.⁵ In addition to what is listed on the Prime Minister's website, he explained that, in addition to the Prime Minister, who chaired the meetings, and the relevant Ministers, other attendees at the IRG meetings may include: exempt staff from the relevant Ministers' offices, the relevant Deputy Ministers, and senior PCO officials who support the IRG.⁶

² May 19, 2022 Transcript at p 6, line 9, CCLA Motion Record, Tab 8, p 143.

³ Transcript at p 6, lines 7-18; p 7, lines 8-14; p 10, lines 8-22; p 11, lines 16-25; p 12, lines 1-6, CCLA Motion Record, Tab 8, pp 143-144, and 147-149, .

⁴ Transcript at p 18, lines 8-9 and 19-20; p 32, lines 11-13; p 38, line 21 to p 39, line 4; p 41, lines 4-12, CCLA Motion Record, Tab 8, pp 155, 169, 175-176, and 178.

⁵ Transcript p 16, lines 4-14; p 20, lines 9-15, CCLA Motion Record, Tab 8, pp 153 and 157; Exhibit 2, CCLA Motion Record, Tab 9, pp 184-190.

⁶ Transcript p 23, lines 5-25; p 24, lines 1-2; p 26, line 2-4, CCLA Motion Record, Tab 8, pp 160-161, 163.

7. While Mr. Shragge indicated that whether an IRG meeting results in a recommendation will depend on the specific situation, he explained that the body encourages a free and frank exchange of information among Ministers.⁷ Given that the same Ministers who attend the IRG attend Cabinet, it can be naturally expected that the discussions from the IRG will flow to Cabinet.⁸

The IRG Informed the Decision to Declare a Public Order Emergency

8. It is necessary to add the following point. The discussions at three IRG meetings informed the decision to declare a public order emergency. The “explanation of the reasons” for issuing the declaration of a public order emergency tabled in Parliament pursuant to s. 58(1) of the *Emergencies Act*⁹ notes that “the decision to issue the declaration was informed by an assessment of the overall, national situation and robust discussions at three meetings of the Incident Response Group on February 10, 12 and 13, 2022.”¹⁰ The AGC therefore acknowledges that information pertaining to these meetings of IRG and its deliberations is relevant to the judicial review application brought by the CCLA, subject to cabinet confidences and any other valid immunities, privileges or objections.

9. In addition, the key parts of section 39 of the *Canada Evidence Act* (CEA) state:

39 (1) Where a minister of the Crown or the Clerk of the Privy Council objects to the disclosure of information before a court, person or body with

⁷ Transcript p 27, lines 8-17, CCLA Motion Record, Tab 8, p 164.

⁸ Transcript p 38, lines 14-20, CCLA Motion Record, Tab 8, p 175.

⁹ [*Emergencies Act*](#), RSC, 1985, c 22, referred to here as the s. 58 Explanation of the Reasons, CCLA Motion Record, Tab 6A, pp 101-114.

¹⁰ S. 58 Explanation of the Reasons, at p 4, CCLA Motion Record, Tab 6A, p 104.

jurisdiction to compel the production of information by certifying in writing that the information constitutes a confidence of the Queen's Privy Council for Canada, disclosure of the information shall be refused without examination or hearing of the information by the court, person or body.

(2) For the purpose of subsection (1), **a confidence of the Queen's Privy Council for Canada** includes, without restricting the generality thereof, information contained in:

...

(d) a record used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

(e) a record the purpose of which is to brief ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (d);

...

39 (1) Le tribunal, l'organisme ou la personne qui ont le pouvoir de contraindre à la production de renseignements sont, dans les cas où un ministre ou le greffier du Conseil privé s'opposent à la divulgation d'un renseignement, tenus d'en refuser la divulgation, sans l'examiner ni tenir d'audition à son sujet, si le ministre ou le greffier attestent par écrit que le renseignement constitue un renseignement confidentiel du Conseil privé de la Reine pour le Canada.

(2) Pour l'application du paragraphe (1), un **renseignement confidentiel du Conseil privé de la Reine pour le Canada** s'entend notamment d'un renseignement contenu dans :

...

d) un document employé en vue ou faisant état de communications ou de discussions entre ministres sur des questions liées à la prise des décisions du gouvernement ou à la formulation de sa politique;

e) un document d'information à l'usage des ministres sur des questions portées ou qu'il est prévu de porter devant le Conseil, ou sur des questions qui font l'objet des communications ou discussions visées à l'alinéa d);

10. Further, section 39(3) of the CEA provides that “Council” means “the Queen’s Privy Council for Canada, committees of the Queen’s Privy Council for Canada, Cabinet and committees of Cabinet.”

PART II – ISSUES

11. Three issues are raised by this motion:

- a) The IRG is a Cabinet committee within the meaning of s 39(3) of the CEA;
- b) Alternatively, even if the IRG is not a Cabinet committee, information related to its communications or discussions are protected under ss. 39(2)(d) and (e) of the CEA; and
- c) The claim of Cabinet confidences is valid in the absence of a s. 39 certificate and the Clerk of the Privy Council requires an opportunity to engage s. 39 of the CEA and make a determination as to whether the public interest in their disclosure outweighs the public interest in maintaining their confidentiality.

PART III – SUBMISSIONS

i) Cabinet Confidentiality is Essential to Good Government

12. The Supreme Court of Canada has recognized that the constitutional convention of Cabinet confidentiality is essential to good government as it protects the public’s

interest in ensuring that the executive branch of government can conduct its internal business in confidence.¹¹

13. Ministers “must be free to discuss all aspects of the problems and issues before them and to express all manners of views, without fear that what they read, say or act on will later be subject to public scrutiny.” Otherwise, Ministers “might censor their words, consciously or unconsciously,” “shy[ing] away from stating unpopular positions”.¹² While Ministers enjoy this freedom to express their views in deliberations, the Ministry must speak with one voice and Ministers are expected to publicly defend the policies or actions of the executive as a whole, even where they may differ from their own views.¹³ This level of candour improves the collective decision-making process, facilitating a considered and informed decision.

The IRG is a Committee of Cabinet

14. As noted above, section 39(3) of the CEA clearly and explicitly sets out that there are committees of Cabinet and they are part of the definition of “Council” for purposes of s. 39 of the CEA.

15. Relying primarily on a decision of a provincial Privacy Commissioner, the CCLA jumps to the conclusion that simply because officials who are not members of Cabinet

¹¹ *Babcock v Canada (Attorney General)*, [2002 SCC 57](#) (*Babcock*) at para 15 and *British Columbia (Attorney General) v Provincial Court Judges’ Association of British Columbia*, [2020 SCC 20](#) (*BC Judges*) at [para 1](#).

¹² *Babcock* at para 18.

¹³ *BC Judges* at [para 96](#).

are present at meetings of Cabinet ministers, that meeting is not a committee of Cabinet. The CCLA appears to ground this very broad conclusion on the basis that cabinet confidentiality will be breached if non Cabinet Ministers are allowed in the room.¹⁴

16. The approach of the CCLA disregards the wording of section 39(2)(d) and (e). These sections refer to the need to protect discussion between Ministers “relating to the making of government decisions or the formulation of government policy” and not only those that occur in the context of a formal “Council” meeting.

17. To determine this matter, rather than look at how provincial bodies have interpreted how provincial committees are designated, the federal process for establishing Cabinet and committees of Cabinet should be the focus.

The Prime Minister Establishes Cabinet and Committees of Cabinet

18. Each Prime Minister decides the contours of Cabinet: “The Prime Minister decides on the organization, procedures, and composition of the Cabinet. This includes establishing Cabinet committees, selecting their membership and convening the Cabinet itself. In practical terms, the Prime Minister forms a team, decides on the process for collective decision making, and builds and adapts the machinery of government in which the team will operate.”¹⁵

¹⁴ CCLA Written Representations paras 34-36, CCLA Motion Record, Tab 16.

¹⁵ [Open and Accountable Government](#), 2015, Government of Canada, at [p 48](#).

19. The Prime Minister's website lists the Cabinet committees currently in existence and includes the IRG. The membership is not listed, but the website notes that membership changes based on the type of incident to be addressed.¹⁶

20. Further, "Cabinet committees are an extension of Cabinet itself. The Prime Minister establishes both standing and temporary (or special purpose) committees, chooses their membership, prescribes their procedures and changes them as he or she sees fit."¹⁷

21. As stated by A.D.P. Heeney,

Under our Cabinet system, the machinery of executive government must serve and not hamper the freedom of action of the political authority. Cabinet procedure and organization must in large measure be of an *ad hoc* nature, capable of rapid change and development to meet the needs of the hour, sensitive in these matters as in all else to the requirements of those who compose the government of the day.¹⁸

22. It is not unusual to set up *ad hoc* Cabinet committees to address special problems as they arise or acquire prominence or urgency.¹⁹ For example: the [Ad Hoc Committee](#)

¹⁶ [PM website on Cabinet committee mandates and memberships](#), CCLA Motion Record, Tab 9, at pp 184–190.

¹⁷ [Open and Accountable Government](#), at p 32.

¹⁸ *Cabinet Government in Canada: Some Recent Developments in the Machinery of the Central Executive*, Heeney, at p 282.

¹⁹ *Ibid*, at p 291.

[on Northern Alberta Wildfires](#), considered and coordinated federal contributions to recovery and rebuilding efforts for those affected by wildfires in northern Alberta.

23. Similarly, the IRG was established as a nimble and flexible committee of Cabinet, capable of quickly responding to a national crisis, which is by its nature unpredictable and kinetic. To realize its mandate to coordinate a prompt federal response and make fast, effective decisions, the IRG requires flexibility to quickly assemble those with the requisite expertise and areas of responsibility.²⁰

The Presence of officials does not change the Character of a Cabinet Committee

24. The functions and composition of committees of Cabinet are not rigid. The Prime Minister, who chairs the IRG, decides the membership and attendees for IRG meetings as he deems appropriate. The IRG does not have a fixed membership. The Prime Minister assembles the individual Ministers and senior government leadership with the expertise and areas of responsibility that are most pertinent to the specific crisis or incident at issue.

25. The unrealistic reading of s. 39 suggested by the CCLA does not conform to the reality of how a modern democratic state is governed. Public servants and exempt staff of a Minister's office may, and regularly do, attend Cabinet or its committees.²¹ Their

²⁰ [PM website on Cabinet committee mandates and memberships](#), CCLA Motion Record, Tab 9, at p 190.

²¹ [Open and Accountable Government](#), at p 33; *Cabinet Government in Canada: Some Recent Developments in the Machinery of the Central Executive*, Heeney, p 291 ("It is now common practice for meetings of most standing and *ad hoc* committees of the Cabinet to be attended by officials of departments concerned."). See also *Cabinet Secrecy*, Nicholas d'Ombrain, p 25, which discusses the introduction of civil servants, including Cabinet secretariat staff, to the Cabinet room. PCO is the Cabinet's Secretariat);

presence is necessary to support the Ministers in their deliberations and decision making process. Given the variety and depth of issues that are placed before Cabinet and its committees, it would be unreasonable to expect Cabinet to function solely on the knowledge of the attending Ministers.

26. In this case, the senior officials who participated at the February 10, 12, and 13 IRG meetings were high-ranking members of the executive branch of government who participated in order to inform Ministers of matters within their respective areas of responsibility. These were senior officials with expertise and knowledge of the quickly evolving and urgent situation on the ground with respect to the illegal blockades and the possible responses to address that situation. These officials were there to brief and support, not to participate in Ministerial deliberations.

27. The remaining officials who attended were there in their role as Cabinet secretariat staff supporting the IRG, its Chair, and their Ministers.²² The fact that senior officials participated in and attended the February 10, 12, and 13 IRG meetings neither changes the status of the IRG as a committee of Cabinet nor results in any loss of Cabinet confidentiality.

28. Support of Cabinet ministers in their roles is a necessary part of the functioning of the committee. As discussed below, these additional attendees and members of the IRG do not detract from the IRG being a cabinet committee, nor does their presence detract

²² [Open and Accountable Government](#), pp [32-33](#); *Cabinet Secrecy*, Nicholas d'Ombrain, p 25.

from the fact that Cabinet Ministers were engaged in discussion concerning government decisions or the formulation of government policy as set out in s. 39(2)(d).²³ Further, contrary to the suggestion of the CCLA, a committee of Cabinet does not need to have “decision making powers” to “attract the protections” of s. 39. There is no prerequisite in s. 39 that states that decisions need to be made in order for s. 39 to apply.²⁴

29. Finally, the Attorney General has never suggested that simply because the Prime Minister or Cabinet Ministers enter a room Cabinet confidentiality automatically applies. The CCLA misses the rather clear distinction between a meeting comprised of Cabinet members and supporting senior officials who meet in a highly confidential manner to discuss important matters for the government, versus merely entering a room.

30. The CCLA asserts that the IRG did not serve the function of Cabinet or advise the Governor in Council in making its decision to invoke the *Emergencies Act*.²⁵ It is not necessary that the IRG serve the function of Cabinet in order to be a Cabinet committee. It acted as a Cabinet committee in performing its described role as a working group to ensure Ministers are well informed and are coordinating, sharing information, and maintaining situational awareness with the assistance of well-placed senior public service officials to work towards resolving issues of national significance.²⁶ Also contrary to the

²³ CCLA Written Representations at para 46, CCLA Motion Record, Tab 16, p 316.

²⁴ However, the mandate of the IRG on the PM [website](#) includes making decisions: “Responsible for coordinating a prompt federal response to an incident, and making fast, effective decisions to keep Canadians safe and secure, at home and abroad.”, CCLA Motion Record, Tab 9, p 190.

²⁵ CCLA Written Representations at para 45, CCLA Motion Record, Tab 16, p 316.

²⁶ Transcript of Cross-examination of S. Shragge (May 19, 2022) at p 17, line 20 to p 18, line 4, CCLA Motion Record, Tab 8, p 157.

CCLA's assertions, the IRG's discussions clearly informed the Governor in Council as the s. 58 Reasons make clear.²⁷

Information related to the IRG are confidences of the Queen's Privy Council for Canada as defined in s. 39(2)(d) and (e) of the CEA

31. Irrespective of whether the IRG is a committee of Cabinet pursuant to s. 39(3) of the CEA, information related to the IRG comes within the meaning of confidences of the Queen's Privy Council for Canada as defined in s. 39(2)(d): "A record used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy."

32. Importantly, unlike paragraphs (a) through (c) of s. 39(2), paragraph (d) does not require the information to be related to consideration or deliberation by "Council". Paragraph (d) applies more broadly to communications or discussions between ministers "on matters relating to the making of government decisions or the formulation of government policy."

33. As the matter discussed by Ministers at the IRG meeting clearly involved the making of government decisions and formulation of government policy, s. 39(2)(d) applies and any information contained in records relating to those discussions is a Cabinet confidence. This is in keeping with the underlying purpose of Cabinet confidentiality, which is to preserve the constitutional convention of Cabinet solidarity by protecting the individual views of ministers from public disclosure.

²⁷ S 58 Explanation of Reasons at p 4, CCLA Motion Record, Tab 6A, p 104.

34. Moreover, information contained in records to brief ministers in relation to the matters under discussion at the IRG meetings is also a confidence of the Queen's Privy Council within the meaning of paragraph 39(2)(e). Paragraph 39(2)(e) applies to information contained in a record, the purpose of which is to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (d).

CCLA misapplies the *Ethyl* Decision

35. The decision of this Court and the Federal Court of Appeal in *Ethyl* are irrelevant to the issue before the Court in this matter. There is no "note of caution" to be applied. Contrary to CCLA's assertions,²⁸ the *Ethyl* decision does not stand for the proposition that certificates issued pursuant to s. 39 of the CEA are reviewed for form and substance. The issue in *Ethyl* was whether certain information fell within the definition of "discussion papers" in s. 39(4)(b) of the CEA even if they were part of a memorandum to Cabinet.

36. The Federal Court of Appeal determined that although the formal description of what was covered by the term "discussion paper" had evolved over the years, a "corpus or body of words" that fit the original purpose of a discussion paper should still be classified as a discussion paper and be subject to release in accordance with s. 39(4)(b) even if it was contained in a memorandum to cabinet.²⁹

²⁸ CCLA Written Representations, at para 58, CCLA Motion Record, Tab 16, p 319.

²⁹ *Canada (Environment) v. Canada (Information Commissioner)*, [2003 FCA 68](#) (CanLII), at [paras 25-26](#). [*Ethyl*]

37. The underlying facts, the arguments of the parties, and the decision of the Federal Court of Appeal are completely divorced from the issue before the court in this matter.

38. The Supreme Court in *Babcock* was clear that a certificate under s. 39 can be challenged in two circumstances: (a) where the information for which immunity is claimed does not on its face fall within s. 39(2), or (b) where it can be shown that the Clerk or minister has improperly exercised the discretion conferred by s. 39(2). This review is done on the face of the certificate and based on any extrinsic evidence.³⁰

39. This is what the Court in *Ethyl* did. Neither the Federal Court nor the Federal Court of Appeal looked behind the certificate to the underlying information. They limited their review to the form of the certificate in light of extrinsic information. Specifically, the Federal Court interpreted s. 39(2)(b) of the CEA; recognizing that the ultimate authority to determine whether the information constituted a confidence of the Queen's Privy Council belonged to the Clerk.³¹

A certificate is not required to claim Cabinet confidentiality; the Clerk will engage s. 39 of the CEA

40. It is impractical, or even impossible, to promote a system where a certificate must instantly be produced when s. 39 is invoked. The protection offered by s. 39 of the CEA will be invoked when the information protected by s. 39 is first compelled for production.³² The process proceeds in two phases. First, the claim for s. 39 protection is made in the

³⁰ [Babcock](#) at para 39. See also *Tsleil-Waututh Nation v. Canada (Attorney General)*, [2017 FCA 128](#) [*Tsleil-Waututh*] at [para 28](#).

³¹ *Ethyl* at [para 26-27](#).

³² [Tsleil-Waututh](#) at [para 141](#).

particular context of each proceeding. Obviously the Clerk, or Ministers cannot be present at each proceeding in which s. 39 may be invoked. Therefore the claim of Cabinet confidentiality is made by counsel or other officials once disclosure of a Cabinet confidence has been sought.

41. The second phase of the process is to allow the Clerk to engage s. 39 of the CEA and make a determination under that provision, which in this case will be done on a priority basis. The Court should let that process unfold and the Clerk should be afforded the opportunity to exercise her statutory authority to determine whether the information should be certified.³³ If the Clerk determines that the information should not be certified, it is disclosed, subject to the claim of other privileges.

42. The Supreme Court of Canada has been clear that a determination as to whether Cabinet confidences should be disclosed under s. 39 requires a thorough and considered approach.³⁴ This level of rigor is necessary given the competing public interests and the significant consequences to all affected parties if they are withheld and to the executive branch of government, if they are disclosed. These competing interests must be weighed with reference to a specific document in the context of a particular proceeding.³⁵

43. In this matter there has been no delay in seeking a determination under s. 39 of the CEA. The parties agreed to adjourn the motion originally scheduled for hearing on May 27, 2022 so that they could let the cross-examinations unfold and understand all of

³³ The Supreme Court is clear in [Babcock](#) at para 23 that the common law regime is displaced once the Clerk engages s. 39 of the CEA.

³⁴ *BC Judges* at [paras 100 to 120](#) generally and at para [100](#) and [120](#) specifically.

³⁵ *BC Judges* at [para. 100](#).

the Cabinet confidence issues before taking next steps. As a result, it was understood that the Clerk would not engage s. 39 until after the cross-examinations were completed and the parties knew what the entire s. 39 environment would be. The last cross-examination took place June 24, 2022.

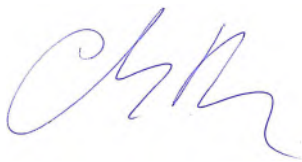
44. Moreover CCLA argues that the IRG is not a Cabinet committee. This justifies awaiting the disposition of this motion before making a determination under s. 39 of the CEA. The Clerk should be entitled to exercise her statutory authority and proceed to determine whether she will issue a certificate in this matter.

PART IV – ORDER SOUGHT

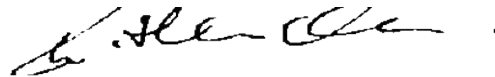
45. The Attorney General of Canada asks that the motion be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Ottawa this 29th day of June 2022.



Christopher Rupar
of Counsel for the Respondent,
Attorney General of Canada



Kathleen Kohlman
of Counsel for the Respondent,
Attorney General of Canada

PART IV – LIST OF AUTHORITIES

CASELAW

1. *Babcock v. Canada (Attorney General)*, [2002 SCC 57](#), [2002] 3 SCR 3
2. *British Columbia (Attorney General) v. Provincial Court Judges Association of British Columbia*, [2020 SCC 20](#)
3. *Canada (Environment) v. Canada (Information Commissioner)*, [2003 FCA 68](#)
4. *Tsleil-Waututh Nation v. Canada (Attorney General)*, [2017 FCA 128](#)

SECONDARY SOURCES

5. Heeney, A. D. P.. “Cabinet Government in Canada: Some Recent Developments in the Machinery of the Central Executive” (1946), 12(3) *The Canadian Journal of Economics and Political Science*, Vol. 12, No. 3 (August 1946), p 282 and 291.
6. d’Ombrain, Nicholas. “Cabinet secrecy” (2004), 47(3) *Canadian Public Administration*, Vol. 47, No. 3 (Fall 2004), p 25.
7. [Open and Accountable Government](#), 2015, Government of Canada

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APPENDIX A – STATUTES AND REGULATIONS

Canada Evidence Act, R.S.C., 1985, c. C-5	Loi sur la preuve au Canada, L.R.C. (1985), ch. C-5
39 (1) Where a minister of the Crown or the Clerk of the Privy Council objects to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying in writing that the information constitutes a confidence of the Queen's Privy Council for Canada, disclosure of the information shall be refused without examination or hearing of the information by the court, person or body. Definition (2) For the purpose of subsection (1), a <i>confidence of the Queen's Privy Council for Canada</i> includes, without restricting the generality thereof, information contained in (a) a memorandum the purpose of which is to present proposals or recommendations to Council; (b) a discussion paper the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions; (c) an agendum of Council or a record recording deliberations or decisions of Council; (d) a record used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy; (e) a record the purpose of which is to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or	39 (1) Le tribunal, l'organisme ou la personne qui ont le pouvoir de contraindre à la production de renseignements sont, dans les cas où un ministre ou le greffier du Conseil privé s'opposent à la divulgation d'un renseignement, tenus d'en refuser la divulgation, sans l'examiner ni tenir d'audition à son sujet, si le ministre ou le greffier attestent par écrit que le renseignement constitue un renseignement confidentiel du Conseil privé de la Reine pour le Canada. Définition (2) Pour l'application du paragraphe (1), un <i>renseignement confidentiel du Conseil privé de la Reine pour le Canada</i> s'entend notamment d'un renseignement contenu dans : a) une note destinée à soumettre des propositions ou recommandations au Conseil; b) un document de travail destiné à présenter des problèmes, des analyses ou des options politiques à l'examen du Conseil; c) un ordre du jour du Conseil ou un procès-verbal de ses délibérations ou décisions; d) un document employé en vue ou faisant état de communications ou de discussions entre ministres sur des questions liées à la prise des décisions du gouvernement ou à la formulation de sa politique; e) un document d'information à l'usage des ministres sur des questions portées ou qu'il est prévu de porter devant le Conseil, ou sur des questions qui font l'objet des communications ou discussions visées à l'alinéa d); f) un avant-projet de loi ou projet de règlement.

discussions referred to in paragraph (d); and (f) draft legislation. Definition of Council (3) For the purposes of subsection (2), Council means the Queen's Privy Council for Canada, committees of the Queen's Privy Council for Canada, Cabinet and committees of Cabinet. Exception (4) Subsection (1) does not apply in respect of (a) a confidence of the Queen's Privy Council for Canada that has been in existence for more than twenty years; or (b) a discussion paper described in paragraph (2)(b) (i) if the decisions to which the discussion paper relates have been made public, or (ii) where the decisions have not been made public, if four years have passed since the decisions were made.	Définition de Conseil (3) Pour l'application du paragraphe (2), Conseil s'entend du Conseil privé de la Reine pour le Canada, du Cabinet et de leurs comités respectifs. Exception (4) Le paragraphe (1) ne s'applique pas : a) à un renseignement confidentiel du Conseil privé de la Reine pour le Canada dont l'existence remonte à plus de vingt ans; b) à un document de travail visé à l'alinéa (2)b), dans les cas où les décisions auxquelles il se rapporte ont été rendues publiques ou, à défaut de publicité, ont été rendues quatre ans auparavant.
<i>Emergencies Act, R.S.C., 1985, c. 22 (4th Supp.), PART VI</i> Parliamentary Supervision Interpretation Definitions 57 In this Part, <i>declaration of emergency</i> means a proclamation issued pursuant to subsection 6(1), 17(1), 28(1) or 38(1); (<i>déclaration de situation de crise</i>) <i>Parliamentary Review Committee</i> means the committee referred to in subsection 62(1); (<i>comité d'examen parlementaire</i>)	<i>Loi sur les mesures d'urgence, L.R.C. (1985), ch. 22 (4^e suppl.), PARTIE VI</i> Suivi parlementaire Définitions 57 Les définitions qui suivent s'appliquent à la présente partie. <i>comité d'examen parlementaire</i> Le comité visé au paragraphe 62(1). (<i>Parliamentary Review Committee</i>) <i>déclaration de situation de crise</i> La proclamation prise en application des paragraphes 6(1), 17(1), 28(1) ou 38(1). (<i>declaration of emergency</i>) <i>jour de séance</i> Jour de séance d'une chambre du Parlement. (<i>sitting day</i>)

sitting day, in respect of a House of Parliament, means a day on which that House is sitting. (<i>jour de séance</i>) Consideration of Declaration of Emergency Tabling in Parliament when sitting 58 (1) Subject to subsection (4), a motion for confirmation of a declaration of emergency, signed by a minister of the Crown, together with an explanation of the reasons for issuing the declaration and a report on any consultation with the lieutenant governors in council of the provinces with respect to the declaration, shall be laid before each House of Parliament within seven sitting days after the declaration is issued. Summoning Parliament or House (2) If a declaration of emergency is issued during a prorogation of Parliament or when either House of Parliament stands adjourned, Parliament or that House, as the case may be, shall be summoned forthwith to sit within seven days after the declaration is issued. Summoning Parliament (3) If a declaration of emergency is issued at a time when the House of Commons is dissolved, Parliament shall be summoned to sit at the earliest opportunity after the declaration is issued. Tabling in Parliament after summoned (4) Where Parliament or a House of Parliament is summoned to sit in accordance with subsection (2) or (3), the motion, explanation and report described in subsection (1) shall be laid before each House of Parliament or that House of Parliament, as the case may be, on the first sitting day after Parliament or that House is summoned.	Étude des déclarations de situation de crise Dépôt devant le Parlement en session 58 (1) Sous réserve du paragraphe (4), il est déposé devant chaque chambre du Parlement, dans les sept jours de séance suivant une déclaration de situation de crise, une motion de ratification de la déclaration signée par un ministre et accompagnée d'un exposé des motifs de la déclaration ainsi que d'un compte rendu des consultations avec les lieutenants-gouverneurs en conseil des provinces au sujet de celle-ci. Convocation du Parlement ou d'une chambre (2) Si la déclaration est faite pendant une prorogation du Parlement ou un ajournement d'une de ses chambres, le Parlement, ou cette chambre, selon le cas, est immédiatement convoqué en vue de siéger dans les sept jours suivant la déclaration. Dissolution de la Chambre des communes (3) Si la déclaration est faite alors que la Chambre des communes est dissoute, le Parlement est convoqué en vue de siéger le plus tôt possible après la déclaration. Dépôt devant le Parlement après convocation (4) Dans les cas où le Parlement, ou une de ses chambres, est convoqué conformément aux paragraphes (2) ou (3), la motion, l'exposé et le compte rendu visés au paragraphe (1) sont déposés devant chaque chambre du Parlement ou devant cette chambre, selon le cas, le premier jour de séance suivant la convocation. Étude (5) La chambre du Parlement saisie d'une motion en application des paragraphes (1) ou (4) étudie celle-ci dès le jour de séance suivant celui de son dépôt.
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Consideration (5) Where a motion is laid before a House of Parliament as provided in subsection (1) or (4), that House shall, on the sitting day next following the sitting day on which the motion was so laid, take up and consider the motion. Vote (6) A motion taken up and considered in accordance with subsection (5) shall be debated without interruption and, at such time as the House is ready for the question, the Speaker shall forthwith, without further debate or amendment, put every question necessary for the disposition of the motion. Revocation of declaration (7) If a motion for confirmation of a declaration of emergency is negatived by either House of Parliament, the declaration, to the extent that it has not previously expired or been revoked, is revoked effective on the day of the negative vote and no further action under this section need be taken in the other House with respect to the motion.	Mise aux voix (6) La motion mise à l'étude conformément au paragraphe (5) fait l'objet d'un débat ininterrompu; le débat terminé, le président de la chambre met immédiatement aux voix toute question nécessaire pour décider de la motion. Abrogation de la déclaration (7) En cas de rejet de la motion de ratification de la déclaration par une des chambres du Parlement, la déclaration, sous réserve de sa cessation d'effet ou de son abrogation antérieure, est abrogée à compter de la date du vote de rejet et l'autre chambre n'a pas à intervenir sur la motion.
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Cabinet Government in Canada: Some Recent Developments in the Machinery of the Central Executive

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CABINET GOVERNMENT IN CANADA: SOME RECENT DEVELOPMENTS IN THE MACHINERY OF THE CENTRAL EXECUTIVE

IT is my impression that, while we are reasonably fortunate in having in Canada a considerable literature in the history and law of the constitution, we have not, as yet, achieved a comparable product on the humbler level of constitutional practice and procedure. There have been notable exceptions but, in the main, this is true. It may, of course, be due to the taciturnity of those who are engaged professionally in the business of government. In any event, because of this lack I have been encouraged to attempt this mechanic's view of the mechanism of executive government in motion—in the hope that it may assist others in more scholarly endeavours.

THE NATURE OF THE CENTRAL EXECUTIVE

General Considerations. Despite the recorded wisdom of Dicey and his successors, no one who has not had some personal experience of the day to day affairs of government can appreciate the degree to which flexibility of method is characteristic of the Cabinet system. Because of this besetting virtue it is not possible for me to set out any complete blueprint of the organization of the working executive or compile any wholly consistent code of its procedures. It is, therefore, appropriate that I should begin with a warning—the practices and procedures of which I shall give some account are by no means immutable; the functions and composition of the committees, which I shall describe, are by no means rigid. Quite the contrary. These are rules and forms honoured frequently in the breach. They are always subordinate to the circumstances of the case and the conveniences and necessities of the Prime Minister and his colleagues. They are affected, too, by the efficiency and shortcomings of officials. Above all, they are subject to the constantly changing pressures of public events. Inevitably the official, by the nature of his employment, will strive for the establishment of settled routines for disposition of ministerial business. But in the very nature of things he cannot wholly succeed. Under our Cabinet system the machinery of executive government must serve and not hamper the freedom of action of the political authority. Cabinet procedure and organization must in large measure be of an *ad hoc* nature, capable of rapid change and development to meet the needs of the hour, sensitive in these matters as in all else to the requirements of those who compose the government of the day.

At the outset, attention should be drawn to the paramount position of the Prime Minister in relation to the machinery of executive government. The Prime Minister must be the master of the Cabinet in matters of organization and procedure. With the assent of colleagues, but on his initiative, Cabinet committees are established, their terms of reference defined, and their membership determined. In any question as to the method by which business is to be dealt with, by what Ministers, by what Cabinet committee, the decision must be that of the Prime Minister. Upon his authority the sequence in which matters are to be discussed is determined, the agenda settled. For any reason which he deems sufficient, he may alter the order of business, even set aside completely an agenda already settled, in favour of other subjects of greater importance and urgency. He may suspend meetings, summon additional

meetings, dispense with or extend the normal record kept by the secretary or modify or set aside in any particular the normal rules of procedure.¹

The human element is, of course, important and the extent to which any Cabinet will be bound by its own rules will vary materially with the individuals who compose it, most of all with the personality of him who presides. It was said, somewhat ironically, that, when Mr. Churchill was away and Mr. Attlee presided over the late Coalition Cabinet in London, meetings were business-like and efficient, the agenda was kept to, decisions were made, and Ministers got away at a reasonable time; when Mr. Churchill presided, on the contrary, nothing was decided, his colleagues listened enthralled and went home many hours late, feeling that they had been present at an historic occasion.²

The Governor-in-Council. Section 9 of the B.N.A. Act provides that "the executive government and authority in and over Canada shall continue and be vested in the Queen"; by Section 11 provision is made for "the Queen's Privy Council for Canada" by whose aid and advice and (as the case requires) with whose consent, the executive government is to be exercised.

Unlike its United Kingdom counterpart, the members of which are summoned to meet on the death and accession of Sovereigns, the Canadian Privy Council does not meet, and indeed has never met.³ On the other hand, "the Committee of the Privy Council" is an exceedingly active body which meets regularly and frequently for the despatch of business. Consisting of all of the members of the government of the day, "the Committee" is the precise source of executive authority. Its proceedings when submitted to and approved by the Governor-General emerge as acts of "the Governor-in-Council," that entity beloved of the Canadian statutes. Under the War Measures Act⁴ and under the recent National Emergency Transitional Powers Act 1945,⁵ it is the Committee of the Privy Council which actually exercises the extensive powers delegated by these statutes for the emergencies of war and transition.

In a series of articles published thirteen years ago,⁶ the late Norman Rogers examined certain of the "federal influences" which have led so extensively to the provision in our statute law for the exercise of executive authority by the Governor-in-Council. It may be that, since that time, these influences have continued to operate with unabated vigour or merely that the force of habit has persisted stubbornly in departmental draughtsmen. In any event, our statutes continue to confer authority upon the Governor-in-Council over a very wide field for the normal occasions of peace as well as for the purposes of war and transition.

¹Interesting if not entirely relevant are certain "prerogatives" of the Prime Minister as listed by order-in-council (*vide* Appendix A).

²"Critic" in the *New Statesman and Nation*, August 4, 1945.

³The only occasion upon which all members of the Privy Council of Canada have been invited to come together was for the luncheon tendered by the government to the King and Queen upon Their Majesties' arrival at Quebec on May 17, 1939. Certain other guests were also invited, as were the Privy Councillors' wives.

⁴1927 R.S.C., c. 206.

⁵9-10 Geo. VI, c. 25.

⁶"The Introduction of Cabinet Government in Canada" (*Canadian Bar Review*, vol. XI, 1933, pp. 1-17); "Federal Influences on the Canadian Cabinet" (*ibid.*, pp. 103-21); "Evolution and Reform of the Canadian Cabinet" (*ibid.*, pp. 227-44).

The exercise of formal executive power on the advice of the Ministry as a whole is much less common in the United Kingdom where authority is normally delegated by Parliament to individual Ministers. In certain special instances, of course, the King-in-Council is required to act and, since 1939, his acts have been relatively frequent. Their volume, however, is slim and their subject matter narrow in comparison with the something over 100,000 formal acts which have been approved by the King's representative in Canada since September of that year.

Council and Cabinet. At this point it would, I think, be helpful to attempt a distinction which is rarely made with accuracy and even more rarely understood—that between “Council” (the Governor-in-Council) and “Cabinet.” Anson,⁷ speaking of course of the United Kingdom, describes the one (the King-in-Council) as the “executive,” the other (the Cabinet) as the “deliberative” body, the former carrying out the policies settled by the deliberations of the latter. The Cabinet is also distinguished from Council by its constitutional function of “advising” the Crown. The traditional manner of summons to meetings is quite different. He concludes that the two bodies are, therefore, distinct in title, function, and form of summons linked only “by the common obligations of the Privy Councillor's oath.”

In Canada the distinction is by no means so clear. As to title, the terms “Council” and “Cabinet” are in practice employed as synonyms even by the Ministers who compose them.⁸ The issue is further complicated at times by use of the term “Cabinet Council.” This confusion results in part from the common membership. All Ministers of the Crown in Canada are members of the Privy Council, of the Committee of the Privy Council, and, with few exceptions in our history,⁹ of the Cabinet. When it comes to the functional distinction we are on doubtful ground for most of the documents dealt with by the Committee are in the form of “advice” to the Governor-General. As to form of summons, there is now no difference in Canada, if ever there was. After the original summons which is that of the Governor-General (on the advice of the Prime Minister) the members of the Committee are now summoned to a “Council” quite informally by the clerk's office. The invitation to the Cabinet in the first instance is, of course, in its constitutional implications that of the Prime Minister. From that time on, however,

⁷W. R. Anson, *Law and Custom of the Constitution* (4th ed., Oxford, 1935), vol. II, pt. I, pp. 109-10 and p. 156.

⁸Incidentally, the terms “ministry,” “administration,” and “government” are, for practical purposes, interchangeable in Canadian usage.

⁹The exceptions were the former Controllers of Customs and of Inland Revenue and the Solicitor-General. Holders of these offices were at one time described as “members of the Ministry (not in the Cabinet).” Details of the successive steps by which each of these offices came to carry permanent Cabinet rank are given in N. O. Coté's *Political Appointments, Parliaments and the Judicial Bench in the Dominion of Canada*, vol. I, 1867 to 1895 (Ottawa, 1896), and vol. II, 1896 to 1917 (Ottawa, 1917). In the case of the Solicitor-General, it may be added that, with the exception of Mr. J. A. Fauteaux appointed in August, 1926, holders of the office, since the appointment of Mr. Meighen in 1915, have always been members of the Cabinet. Mr. Dupré was Solicitor-General from 1930 to 1935, after which the office was vacant until Mr. Jean's appointment to the office in the present Ministry, in 1945.

notice is given through what is in fact the same agency, though the clerk is no doubt acting as secretary to the Cabinet.¹⁰

Nevertheless, the distinction between the two bodies in Canada can, I believe, be validly made and is worth making on a functional basis. In a sense it is fundamental to an understanding of the nature and significance of ministerial procedures.

For all practical purposes, Council and Cabinet in Canada are two aspects of the same constitutional organism. The one, Council, is the formal legal entity, the body composed of the Crown's advisers gathered for the purpose of passing instruments for submission to the Crown's representative. The other, the Cabinet, consists of the same Privy Councillors meeting for the purpose of formulating government policies. The pressures of war, the heavy volume of business which had to be disposed of under emergency conditions have tended to sharpen the division between the formal executive functions of the Ministry and those of a deliberative character. This has given some substance to a distinction of title.

Sitting in Council, the Ministry have placed before them by the clerk or assistant clerk draft "Orders" and "Minutes" prepared from written submissions signed by responsible Ministers. The difference between the order and minute is one of form rather than substance and is not clearly or consistently maintained. Normally, the order is employed for the exercise of explicit statutory authority for the making by the Governor-in-Council of orders or regulations; the minute covers a much wider field in which the Governor-in-Council gives approval to ministerial action. The subject matter of the proceedings of any one Council may vary in importance from orders of a legislative character affecting the fundamental economic processes of the nation to minutes approving routine administrative acts.

Pre-war Procedure. In pre-war days, meetings of Council and Cabinet were a mixture of formality and informality—formality in relation to the executive orders and minutes placed before the Prime Minister or presiding Minister for signature or rejection, informality in relation to the deliberations which normally followed. It might be that these deliberations would have greater significance than the formal executive business though not involving any immediate action by the Governor-in-Council. For the despatch of such business, however, there was no order of proceeding other than such as the Prime Minister might decide or as was determined by the sequence in which Ministers were seated about the Council table. No minutes or conclusions were kept, though the Prime Minister might for his own use make a note of important decisions. No officials were present unless called in for the purpose of information or advice upon some particular question. The decisions of the Ministry in the exercise of the formal executive authority of the Governor-in-Council were recorded in the most precise form. Their conclusions on matters of policy, however, remained unrecorded unless of such a nature as to require formal action subsequently on the part of Council. In short, Council decisions were recorded in orders and minutes; the decisions of the Cabinet were unwritten.

¹⁰It is perhaps worth noting that the quorum of "Council" is four Ministers. This rule originates in the Instructions to Viscount Monck (William Houston, *Documents Illustrative of the Canadian Constitution*, Toronto, 1891, p. 249). It was subsequently fixed by order-in-council (*vide* Appendix A). There is no fixed quorum for meetings of the Cabinet.

THE EFFECTS OF THE WAR

Proceedings of Council: Extent and Nature. The extent to which the war added to the volume of government business was bound to have some effect upon organization and procedure. The number of ministerial submissions to the Governor-in-Council had begun to increase before September, 1939. The actual declaration of war greatly accelerated the flow from all departments. This cast an increasingly heavy burden upon Ministers and officials alike and the volume of Council business in the war years is a fair measure of the strain upon the central mechanism of government. Including Treasury Board proceedings requiring the approval of Council, the Governor-in-Council actually passed 92,350 items of business from August 25, 1939 to September 2, 1945. These were divided as follows:

Orders-in-Council and minutes of Council.....	56,202
Proceedings of Treasury Board.....	36,148
	92,350

This immense stream of formal executive proceedings is, of course, explained by the combination of the emergent conditions of war and the necessity, under the statutes, of having to obtain the sanction of the Governor-in-Council to executive action in a multiplicity of minor matters. Many of the questions to be decided were, of course, of unusual difficulty and importance. The Ministry had to cope, therefore, not only with a record number of administrative decisions, increased above the pre-war level by more than two and a half times; they had also, under the emergency power, to consider and decide upon matters of the most fundamental character and enact war-time legislation affecting almost every phase of the national life.

It is important to distinguish between those acts of the Governor-in-Council during the war years which represented war-time legislation under the emergency power and those which represented decisions of a purely administrative character. The following analysis may be regarded as reasonably accurate in reflecting the nature of "government by Order in Council" during the war period (August 25, 1939 to September 2, 1945):

Approval of contracts for supplies requiring the approval of the Governor-in-Council.....	45 per cent
Other administrative acts—changes in establishments, appointments, refunds, etc.....	50-51 per cent
Acts of a legislative character.....	4-5 per cent

That is to say, of the impressive total of over 90,000 proceedings passed by Council during six years of war, not more than 5 per cent represented emergency legislation by the executive. The other acts were of an administrative nature only, representing an immense increase in number and extent, but of no real significance in relation to the exercise of extraordinary powers.

The conditions of their war-time labours made much heavier demands upon Ministers and officials and upon the machinery of the central executive. Speed became of the essence, not only at the outset when so much had to be done in so little time, but on throughout the war. Secrecy became a matter not only of Cabinet convention but of national security. Many hands and many heads were required

in the conduct of affairs; at the same time it was essential that certain matters discussed by the Ministry and in the course of preparation be closely guarded. Finally, in such a welter of matters pressing for decision, some means had to be found to settle priorities, to provide for an efficient order of business. And some way had to be found for spreading the load.

Organization and Procedure: Cabinet Committees. One of the expedients adopted from the beginning to meet the increased pressure was the constitution of committees of Ministers with special fields of responsibility. In the autumn of 1938, a Defence Committee of the Cabinet had been established under the Prime Minister to consider defence questions in relation to the approaching emergency. Smaller and more compact than the larger Cabinet, this Committee was able to concentrate on the examination of matters of defence and security. It was advised by the Chiefs of Staff and its deliberations were related to the work of the active interdepartmental Defence Coordination Committee,¹¹ which compiled the "Canadian War Book" covering all phases of emergency preparations.

On the eve of actual hostilities an order-in-council¹² was passed setting up six "sub-committees of Council" to provide for a proper distribution of work and an effective allocation of duties among the Ministers. The first of these, the Emergency Council, succeeded the earlier Defence Committee and was charged with the consideration of questions of general policy and the co-ordination of "all operations of government." The other sub-committees were allotted specific fields of responsibility—supplies, legislation, public information, finance, internal security. In December, 1939, a substantial re-organization was effected,¹³ the earlier sub-committees of Council being replaced by nine "Committees of the Cabinet," a term, incidentally, more accurate than that of the earlier order. These Committees consisted of the War Committee, with terms of reference similar to its predecessor the Emergency Council, and eight other Committees with specific functions.¹⁴ Composed of the Ministers who, because of their portfolios, seniority, or special qualifications were deemed best suited to their respective terms of reference, these Committees were established, in the words of the order, "to provide more effectively for the conduct of all phases of Canada's war effort and for the efficient co-ordination of the various activities of government related thereto."

A few days later a Committee on Demobilization was added¹⁵ to consider questions relating to demobilization and discharge from the forces. This brought to ten the number of Cabinet Committees with special war-time responsibilities.

As the Prime Minister said in one of the relatively rare discussions in Parliament on the machinery of war-time government¹⁶ the purpose of establishing this elaborate system of Cabinet Committees with related committees of officials was

¹¹Established by Order-in-Council P.C. 531, March 14, 1938.

¹²Order-in-Council P.C. 2474, August 30, 1939.

¹³By Order-in-Council P.C. 4017½, December 5, 1939.

¹⁴War Finance and Supply, Food Production and Marketing, Fuel and Power, shipping and Transportation, Price Control and Labour, Internal Security, Legislation and Public Information.

¹⁵By Order-in-Council P.C. 4068½, December 8, 1939.

¹⁶*Canadian House of Commons Debates*, vol. II, July 8, 1940, p. 1384 *et seq.*

"to co-ordinate the work of the government, to prevent duplication of effort and to promote efficiency." By this means "the duties and burdens" of harassed Ministers were "distributed and shared" under the War Committee whose attention was directed to the "general problems of the war." It was on this occasion that the Prime Minister rejected suggestions that a War Cabinet be formed of Ministers having no administrative responsibilities and that the Cabinet War Committee include outside appointments and members of opposition parties. He did, however, invite two members of the official Opposition to become associate members of the War Committee and agreed to consider the extension of the invitation to the leaders of other political groups. This offer was not, however, accepted.

The Committee régime established by the order-in-council of December, 1939 remained formally in existence until the end of the war. Several of the Committees performed important and useful functions. Some fell into disuse soon after they were created, their duties being taken over by other agencies of government.¹⁷

These Cabinet Committees illustrate the course which Cabinet Committees commonly run. Their life is governed, their survival determined by the operation of laws as inexorable as those of the physical universe. Created to provide a means for concentrating ministerial attention upon problems which, at the time, require special treatment, they tend to diminish in activity and influence as the need diminishes and ultimately to disappear. In some instances their functions are taken over by the development of new organs. Their authority, effectiveness, and longevity are inevitably affected by the prestige and initiative of the Ministers who compose them but their active continuance is in the end determined by whether or not they serve necessary purposes.

The orders-in-council by which these particular war-time Committees were set up were not finally revoked until September 5, 1945.¹⁸ Long before that time, however, all of them, with the exception of the War Committee and the Committee on Demobilization had ceased to have anything but a nominal existence.

The Cabinet War Committee. From the first the Cabinet War Committee was the most important and active of the war-time committees of the Cabinet. As established in December, 1939 it consisted of six members—the Prime Minister (Mr. Mackenzie King), the Leader of the Government in the Senate (Senator Dandurand), the Ministers of Justice (Mr. Lapointe), Finance (Mr. Ralston), National Defence (Mr. Rogers), and Mines and Resources (Mr. Crerar). When it last met in the spring of 1945 it consisted of the Prime Minister (Mr. Mackenzie King) and the Ministers of Mines and Resources (Mr. Crerar), Finance (Mr. Ilsley), Transport (Mr. Michaud), Munitions and Supply (Mr. Howe), National Defence for Air (Mr. Gibson), National Defence for Naval Services (Mr. Macdonald), Justice (Mr. St. Laurent), and National Defence (General McNaughton).

Over the whole period the War Committee met 343 times. Between the date of the first and last meetings the composition had been altered from time to time to accord with changes in the Ministry and for other reasons. In some cases, the

¹⁷*Vide* Appendix B, which gives a summary of the history of these Committees.

¹⁸By Order-in-Council P.C. 5915.

changes were accomplished formally by order-in-council, in others by simple direction of the Prime Minister. But the pattern remained constant throughout. The Prime Minister presided (in his absence, the Acting Prime Minister). The Defence Minister or Ministers were always members as was the Minister of Finance and the Minister of Munitions and Supply. The remaining members were among the most experienced and influential Ministers of the day. The result was that, while the War Committee like other Cabinet Committees was never an executive body but was, in fact as in form, purely advisory in character, its prestige was such that its decisions were for practical purposes the decisions of the Government.

The sanction for its acts was in the authority of its members not in any formal delegation of authority. The complete Ministry continued to meet as in peace-time and, upon important matters of government policy, reports were commonly made to the full Cabinet.

From the outset, the procedure of the War Committee differed from that of the Cabinet and other Cabinet Committees. A record of discussions and decisions was kept, an official usually attending for that purpose. After the appointment of a Secretary to the Cabinet (the Clerk of the Privy Council) in March, 1940, this became a regular procedure. This official became Secretary to the War Committee and minutes were taken of all meetings from then until the Committee ceased to exist. The pressure of business before the Committee, particularly after the early summer of 1940, also resulted in the progressive adoption of more orderly methods of doing business and a gradual departure from the informal procedure which characterized meetings of the full Cabinet. Under the order-in-council of his appointment as Secretary to the Cabinet,¹⁹ the Clerk of the Privy Council was charged, under the direction of the Prime Minister, with "the preparation of agenda of Cabinet meetings." This duty was first performed for meetings of the War Committee, for which agenda were prepared and circulated to members in advance. A parallel custom also developed of attaching memoranda explanatory of the items set down for discussion. Such papers were prepared either in the department of the Minister responsible for having the subject placed on the agenda, or by the Secretary or a member of the Privy Council Office staff in consultation with the departments principally concerned. The Secretary also informed Ministers of decisions affecting them and subsequently a routine "follow-up" was circulated to departments regarding action taken thereon.

Another feature of War Committee meetings was the frequent attendance of civil and military advisers. In addition to the Secretary, the Under-Secretary of State for External Affairs was regularly present at meetings. The late Dr. Skelton first attended a meeting of the War Committee in the early days of April, 1940 and missed few meetings from then until his death in the winter of 1941. His successor in office attended thereafter. The Chiefs of Staff, as the principal military advisers of the government, were of course constantly consulted by the War Committee and regularly attended meetings when military questions were under consideration. Officials of other departments were also called in for information and advice in their particular fields.

¹⁹By Order-in-Council P.C. 1121, March 25, 1940.

When a question of direct concern to a Minister not of the War Committee was under consideration, it became accepted procedure to invite that Minister to attend for its discussion. In this way, without losing the practical advantages of a small working group of senior Ministers, the War Committee was able to avoid trespassing upon the special departmental jurisdictions of other members of the government.

TRANSITION TO PEACE: THE PRESENT MACHINERY

Cabinet Organization. Until the end of hostilities in Europe, the War Committee continued to function as the mechanism of decision upon all major matters of policy. Even in the months preceding VE-Day, however, the emphasis had begun to shift from problems concerning the conduct of the war to those of the post-hostilities period. The major policy questions requiring ministerial consideration related increasingly to reconstruction and re-establishment. A Department of Reconstruction had been established by statute in 1944²⁰ and had already set about its task. The Cabinet Committee on Demobilization increased its activities. Questions of repatriation and re-establishment, re-employment and industrial reconversion began to compel first attention on the part of the Ministers.

This change of emphasis, accelerated by the end of the war against Germany, was soon reflected in the procedural pattern of government. The Cabinet War Committee did not meet again after the departure of the Prime Minister for San Francisco in April 1945²¹ to attend the United Nations meeting. It was replaced briefly by a special committee of the Cabinet which dealt with the principal remaining war-time questions. With the end of hostilities against Japan, major questions of policy reverted to the Cabinet as a whole, and a new series of standing Cabinet Committees was developed. The names of the four chief of these indicate the problems which were then engaging first attention—the Committee on Reconstruction set up by order-in-council of October 1944²² under the Minister of Reconstruction, the Committee on Demobilization and Re-establishment, a descendant of the 1939 Committee on Demobilization, under the Minister of Veterans Affairs,²³ the Committee on Defence, under the chairmanship of the Minister of National Defence.²⁴ The fourth, the Canadian Mutual Aid Board, was in form a statutory Committee of the Privy Council.²⁵ It was first established under the Mutual Aid Act of 1943²⁶ and continued as a medium of joint ministerial consideration and decision in relation to Canadian participation in the work of UNRRA and certain other questions of external trade and finance. These four Committees—Reconstruction, Demobilization and Re-establishment, Defence, and (to a decreasing

²⁰8 Geo. VI, c. 18.

²¹The last meeting of the War Committee was on April 11.

²²By Order-in-Council P.C. 7993, October 13, 1944.

²³The original Order-in-Council (P.C. 4068½ of December 8, 1939) was revoked and the membership and terms of reference of the Committee were revised by Cabinet decision of October 3, 1945.

²⁴In a sense the peace-time successor of the War Committee, this Committee was set up by the Cabinet in October, 1945 to consider and advise on post-war defence problems.

²⁵*Vide infra* re Committees of Council.

²⁶7 Geo. VI, c. 17, s. 3.

extent) the Mutual Aid Board, continue down to this time, with the older standing Committees of the Privy Council —Treasury Board, the Wheat Committee, and the Committee on Scientific and Industrial Research²⁷—to be the principal working Committees of Ministers.

Ad Hoc Cabinet Committees. Other committees on an *ad hoc* basis are set up regularly to deal with special problems as they arise or as they acquire prominence or urgency. Such committees may have a brief existence. They may meet but once and submit their report for Cabinet consideration. They may, on the other hand, continue to sit regularly and frequently over a period—a recent Committee on Food (in relation to the present world emergency) is an example of the last—referring from time to time to the full Cabinet. Such committees are occasionally established formally by order-in-council. This will be so if they are to have administrative responsibility or authority for the expenditure of funds. More frequently, however, they are set up by Cabinet decision. Their composition varies—Ministers being named to them in relation to their departmental functions, their special qualifications or prestige, or because of the sections of Canada which they represent. Sometimes these committees are known to the public—the Prime Minister has made reference to the work of certain special Cabinet committees in Parliament on a number of occasions. More often, however, these *ad hoc* committees represent purely internal arrangements and the results of their labours are to be found only in the decisions taken by the government as such.

One Cabinet committee of some current prominence is something between the standing and *ad hoc* variety, the Committee on Dominion-Provincial Relations. Established originally²⁸ in connexion with the government's war-time agreements with the provinces, and reconstituted²⁹ to supervise the preparation of new agreements, this Committee has continued ever since to be active and important in the field of Dominion-Provincial relations.

It is now common practice for meetings of most standing and *ad hoc* committees of the Cabinet to be attended by officials of departments concerned. So, for example, the Reconstruction Committee is normally attended by the Deputy Ministers of Finance and Reconstruction and frequently by other departmental officers. Likewise, the Deputy Ministers of Veterans Affairs, Labour, and National Defence and other officials are regularly present at meetings of the Cabinet Committee on Demobilization and Re-establishment. The Defence Committee is attended by the Chiefs of Staff, the Under-Secretary or the Associate Under-Secretary of State for External Affairs, and the Secretary to the Cabinet; the Mutual Aid Board, by senior officials of Finance and Trade and Commerce, as well as Reconstruction and Supply.

Committees of Council. The above observations apply primarily to Cabinet committees proper, that is committees of Ministers established by the Cabinet or by the Governor-in-Council and having, with few exceptions, purely advisory functions. The decisions of such committees are not executive. The degree to which their deliberations determine government policy depends solely upon the

²⁷*Vide infra* re Committees of Council.

²⁸By the Cabinet on September 19, 1940.

²⁹By the Cabinet on February 14, 1944.

extent to which they succeed in having their conclusions accepted by their colleagues in the Cabinet. Occasionally a Cabinet committee may be set up by order-in-council and charged with a specific responsibility—such as the conduct of a publicity programme on some matter of national importance. It may even be given authority to authorize the expenditure of funds from the war or demobilization appropriations. This, however, is an exceptional procedure. It may be taken as a general rule that Cabinet committees are advisory in fact and in form.

Committees of the Privy Council on the other hand are more commonly clothed with executive authority in specific fields. So the Treasury Board is a Committee of the Privy Council established under the Department of Finance and Treasury Board Act³⁰ with substantial powers relating to finance, revenue, expenditure, and public accounts. The Mutual Aid Board has already been referred to. Its authority is wide and, within its statutory limits, it is final. The Committee on Scientific and Industrial Research³¹ exercises a general supervision over the National Research Council. The Wheat Committee,³² on the other hand, though a Committee of the Privy Council, is limited to functions of co-ordination and advice.

Procedure. An important development in the transition from the war period was the adoption by the Cabinet of the procedures introduced between 1940 and 1945 in the Cabinet War Committee. The Secretary had normally attended meetings of the full Cabinet since the date of his appointment but there had been no significant change from the procedure of the pre-war years. No regular record of decisions was kept and no agenda was prepared in advance. From the summer of 1945, however, substantial changes were introduced. Questions of major policy were reserved for discussion at a regular weekly meeting for which an agenda was drawn up. Notice of such questions, with supporting explanatory documents was required from Ministers, and agenda and relevant papers were circulated prior to the meeting. "Conclusions" were regularly recorded by the secretary along with a brief minute of the essential features of each subject discussed. Ministers affected received a written note of decisions and follow-ups were sent out from the Privy Council Office after each meeting to the departments concerned with implementing them.

At the same time the practice which had been adopted during the war of having a special group of Ministers (the Government Business Committee) go over routine administrative orders and minutes in advance of meetings of Council in order to lighten the burden upon the whole body of Ministers was extended and revised. A Special Committee of Council was appointed to dispose of all formal business which did not involve any question of major policy or any new factor which had not been the subject of consideration by the Cabinet. A submission to Council by any Minister which appeared to raise any such question was reserved for the next regular Cabinet meeting and dealt with by the Special Committee only when a conclusion thereon had been reached.

³⁰1927 R.S.C., c. 71, ss. 9 and 10.

³¹Established by Order-in-Council P.C. 1266, June 6, 1916 and transferred to the chairmanship of the Minister of Reconstruction and Supply from that of the Minister of Trade and Commerce by Order-in-Council P.C.7995, October 13, 1944.

³²Established by Order-in-Council P.C. 3455, October 31, 1935.

These procedures, initiated under the pressures of war, have not been adhered to by any means rigidly. They have, however, in part at least, achieved their object of relieving the Cabinet in considerable measure of detailed routine business and have permitted more time for deliberation on major policy questions. The practice of having routine Council proceedings dealt with by the Special Committee has greatly reduced the numbers of formal instruments requiring to be placed before the full Committee of the Privy Council. Indeed it is now very exceptional for the whole body of Ministers to pass a minute or order. It may be recalled that the extent of the formal business with which Canadian Ministers have had to deal has been the subject of comment from outside observers even at a period when the number of orders-in-council was very small by comparison with recent standards. In 1912, Sir George Murray in his report on the machinery of Canadian government recommended the delegation of such formal business to individual Ministers and small committees of Ministers.³⁸ This in effect is what has now been done. The federal difficulties to which Norman Rogers drew attention in 1933 have been met in part at least by reserving to the Cabinet decision upon ministerial submissions raising questions of policy upon which there has been no prior guidance from the Ministry as a whole.

The other procedural developments which have been described have also contributed to efficiency in the despatch of Cabinet business and to a more effective allocation of the time of the Prime Minister and his principal colleagues. Circulation of agenda with explanatory documents has made it possible for Ministers to prepare for the consideration of questions with which they are concerned and has tended to shorten the time required for discussion. The preparation of agenda permits of an orderly disposition of items in some relation to priorities of urgency

³⁸Sir George Murray, *Report on the Public Service of Canada*, 1912, Sessional Papers, 1913, no. 57A, p. 9.

After recommending that certain duties then performed by the Governor-in-Council might safely be entrusted to the discretion of individual Ministers, Sir George went on to say: "Even after this relief has been given to the Governor in Council there will still remain many matters which, though of small intrinsic importance, must for various reasons receive the approval of the highest administrative authority. There will always be some decisions which, though properly taken by an individual Minister on his own responsibility, may yet require the outward form of sanction by the Governor in Council.

Whenever this sanction is merely formal and does not require the collective consideration of Ministers it should be given at a meeting of Council constituted for the purpose. It is not necessary that the whole body of Ministers should attend; the minimum quorum would be sufficient for the purpose and the business, being formal, would be rapidly transacted.

In other words a distinction should be drawn between a meeting of the Cabinet and a meeting of Council.

At present the Cabinet, besides performing its proper functions of discussion and deciding questions of high policy, is compelled to conduct a large amount of purely routine business. If the latter were relegated to a meeting of Council summoned *ad hoc* and in much smaller numbers, the time at the disposal of the Cabinet for its more important duties could be better employed."

Some interesting comments on this and other relevant features of the Murray Report are contained in the Report of a Special Committee on the Machinery of Government set up by the Senate on May 6, 1919 at pages 6 to 10, also Appendix I at pages 20 and 21.

and importance. This surely is one of the most difficult of problems in any executive body whose members have a constant backlog upon which they themselves are being pressed for decisions.

The practical advantages of having a clear record taken of Cabinet conclusions which can be communicated to those responsible for acting thereon needs little comment. In the multiplicity of affairs of modern government, it is difficult to see how business could be carried on satisfactorily without some such procedure.³⁴ Nor has the introduction of a formal record had the effect of compromising the freedom and secrecy of discussion which is such an essential feature of Cabinet deliberations.

The disposition of Cabinet business during the parliamentary session is subject to special difficulty. The time and energy of members of the Cabinet are then to a large extent devoted to the proceedings of the House of Commons. There is less opportunity for the performance of departmental duties and for dealing with general executive business. Events in Parliament take unexpected turns which require the immediate attention of the Ministry outside the usual course of Cabinet affairs. Government caucuses and parliamentary committees make further demands and the time of Ministers must to some extent be available to private members. Customarily, the House meets afternoons and evenings. Toward the end of a crowded session, it sits in the mornings as well. Cabinet and Cabinet committee meetings must be fitted in as and when they can. At such times, the orderly despatch of Cabinet business is not easy and the virtues of procedural flexibility become daily necessities.

Interdepartmental Committees. During the war the government sought to spread the increased burdens of administration, shorten the previous procedural delays, and co-ordinate the wisdom of their official advisers by the creation of a number of interdepartmental committees. These committees were composed of senior officials of the departments most directly involved in the various phases of war activity. One of the first and most important was the Advisory Committee on Economic Policy set up on September 14, 1939.³⁵

The Deputy Minister of Finance became Chairman of this Committee which reported directly to the Committee of the Cabinet appropriate to the subject matter under consideration. It included in its membership a number of the principal Deputy Ministers and the Governor of the Bank of Canada and, in the early years

³⁴Sir Austen Chamberlain, in 1922, well expressed this viewpoint in the United Kingdom House of Commons on the estimates for the Cabinet Secretariat, saying: "The decision is not made, or taken, or executed, by the Cabinet Secretariat. That is no part of their functions, but it is their business to see that the decision is properly recorded, and that as so recorded it is communicated to the Minister of the Department concerned. That has, incidentally, a great advantage. When the decisions of the Cabinet have to be recorded, the decisions have to be clear. I have known Cabinets to break up under the impression that they had settled something, and every Minister going away asking his neighbour what was the decision to which they had come. The institution of a Secretariat makes that impossible, because the decision must be recorded, and if not clear, the Secretary has to ask, 'What have I to record?' That is of more consequence than some of those who have not sat in Cabinets would be led to suppose" (*United Kingdom Parliamentary Debates Commons* 155, 1922, col. 223-4).

³⁵Order-in-Council P.C. 2698.

of the war, played an important role in providing the joint advice upon which the government's economic and fiscal policies were based. In the months and years which followed other interdepartmental committees on a variety of subjects were set up. Some of these disappeared without having had much effect on policy; others contributed in some measure to the volume of reports and advice submitted to the Cabinet War Committee and then fell into inactivity. Others again achieved the position of standing war-time agencies of some continuing functional importance and influence.³⁶

The functions of certain other committees, like those on air transport policy, merchant shipping policy, and food requirements related to problems which continued to be important in the post-war period. Many of these committees are still active. A few were under the chairmanship of Ministers, like the standing Committees on Research for Defence and on Public Records. Some had mixed civil and military membership like the Advisory Committee on Post-hostilities Problems, the Psychological Warfare Committee, and a number of others.

The change from war to transition had affected materially the organization of the Cabinet and Cabinet committees. This was also true of the principal interdepartmental committees. In 1943, the Economic Advisory Committee had had its terms of reference extended to include problems of reconstruction and reconversion.³⁷ The establishment of the Department of Reconstruction and the Cabinet Reconstruction Committee, however, tended to decrease the need for the Advisory Committee. Its place as a forum of discussion on the official level and as a medium for submission of joint advice was taken over by working groups of officials from the departments concerned, under the aegis of the Cabinet Committee. The Cabinet Defence Committee continued to be advised by the Standing Committee of the Chiefs of Staff. Provision was made for the addition of appropriate civilian officials when subjects under discussion by the Chiefs involved considerations of a non-military character. This expedient rendered the former Post-hostilities Problems Advisory Committee unnecessary and it died a natural death. Other Cabinet committees, standing and temporary, are commonly served by subordinate working committees of officials which prepare the data, define the issues and, where possible, agree upon joint recommendations for submission to the Ministers.

The Secretariat. The increasing volume of work which the Cabinet War Committee was called on to despatch as the war went on led gradually to the development of a small staff within the Privy Council Office to assist the secretary in the performance of his duties. The preparation of agenda and related memoranda, the frequent consultations with departmental officials, the keeping and circulating of minutes and conclusions, the following up of decisions and similar related duties proved to be more than could be accomplished with the peace-time staff of a department already under the pressure of war in the performance of its normal functions. Contact with other Cabinet committees, with Ministers, and with senior advisory committees had also to be maintained in order that the War Committee could be kept abreast of developments in all sectors of the war effort. This liaison

³⁶E.g., the Joint Defence Construction Projects Panel, the Wartime Committee on Hospitalization, the Advisory Committee on Rehabilitation and Re-establishment.

³⁷Order-in-Council P.C. 608, January 23, 1943.

was effected by having the Privy Council Office provide the secretariat for the principal Cabinet and interdepartmental committees or, occasionally, by direct representation on the latter. Where the War Committee's interest was of marginal importance, copies of minutes were provided to the Privy Council Office for information.

These requirements were met by the gradual organization about the War Committee of a small secretariat composed of officials whose services were obtained some by loan from other civil and military departments and others by temporary appointment from outside the Public Service. In 1944, the Secretariat of the Chiefs of Staff Committee was integrated with that which had grown up within the Privy Council Office. Officers from each of the three services were attached to the department for the performance of duties relating to defence questions coming before the government. These officers served as secretaries to Committees of Ministers and officials dealing with matters of a military nature or with important defence aspects.³⁸

Civil members added to the departmental staff in this period assisted the secretary in and out of meetings, served as secretaries to the principal Cabinet and interdepartmental committees appointed from time to time on other than military subjects, and prepared reports and memoranda for the Prime Minister and the War Committee.

The small organization thus developed during the war years to serve the War Committee has continued into the period of transition and now, with certain appropriate changes in personnel, performs the duties of a secretariat to the Cabinet. Its members are part of the establishment of a regular department of government—the Privy Council Office—responsible to the Prime Minister as President of the Privy Council. The numbers of those employed for these purposes during the war never exceeded ten, mostly seconded from service and other departments. The Cabinet Secretariat is at the moment one below that total, of whom only three, in addition to the permanent head, are without other affiliation, the remainder being on loan from various departments.³⁹ The number and departmental connexion of the latter group tends to change with the major trends in government business. The tour of duty for officials seconded to the Secretariat varies but is normally from one to three years.

The Secretariat of the Chiefs of Staff Committee continues to form part of the Cabinet Secretariat thus extending into the post-war period the close relationship which grew up under the War Committee. A particularly fortunate connexion is that maintained with the Department of External Affairs. This is due largely to the fact that the Prime Minister holds, as well, the offices of President of the Privy

³⁸A Military Secretary to the War Committee was added in 1944. This officer was also Military Staff Officer to the Prime Minister and a member of the Chiefs of Staff Committee. He had special responsibility for advising the Prime Minister and the War Committee on military aspects of questions coming up for decision. No successor in this office was appointed when Lieutenant General Maurice Pope left in October, 1945, to become Head of the Canadian Military Mission in Germany.

³⁹At present members of the Secretariat on loan are as follows: from the Department of National Defence—one civilian, two service officers; from Mines and Resources—one; from Labour—one; from Trade and Commerce—one.

Council and Secretary of State for External Affairs. The Privy Council Office and members of the Secretariat also maintain continuous contact with all other departments and agencies having business before the executive.

THE INFLUENCE OF UNITED KINGDOM PRECEDENTS

It will have been recognized that the course of development in Canada over the past six years has been, in many respects, the same as that which took place in the United Kingdom during and after the First World War. Originating in the Secretariat of the Committee of Imperial Defence, the Cabinet Secretariat in Britain was instituted by Lloyd George in 1916 to organize the business of the War Cabinet. Gradually it became an integral part of the machinery of government. In 1918 the Haldane Committee recommended that the Secretariat should be maintained.⁴⁰ Bonar Law, four years later, proposed to abolish it but its utility had been clearly proved and it persisted. Between the wars the Cabinet Secretariat continued to develop into an efficient central co-ordinating mechanism, for many years under the aegis of its creator, Lord Hankey. On the eve of the Second World War, the Cabinet Office was ready for the further expansion and development demanded by the new conditions. Before hostilities had ended it had become one of the most important of the departments of state.⁴¹ Incidentally, the development in the Cabinet Secretariat of the techniques of co-ordination and the experience gained in Britain in the pre-war years were to no inconsiderable extent responsible for the successful operation of the intricate mechanism of the United Kingdom-United States Combined Chiefs of Staff.

The war-time developments in the machinery of Cabinet government in Canada obviously owe much to the British pattern and experience. The same procedures which were first introduced in 1916 in the United Kingdom War Cabinet and continued in the peace-time Cabinets which followed were models from which Canadian practices were evolved from 1940 onward. It was neither necessary nor appropriate, however, to translate the British system completely and, in the process, a number of modifications were effected to suit Canadian conditions. Thus the Cabinet Secretariat in Canada was not created as a new department of government but was combined with and became part of an existing department of long standing—the Privy Council Office.⁴² This was a desirable and natural combination in Canada where the formal executive has such an active role. The new functions were conveniently added to the old in the one department; a separation of the two would have created an unnecessary and difficult division in the machinery of the central executive.

In other minor respects, the Canadian procedures have been varied consciously from British precedents to meet Canadian requirements. Canadian Cabinets are generally larger than those in the United Kingdom. In recent years, at least, we have not followed the practice of having Ministers at the head of departments who are not “of the Cabinet.” Since the days of the Cabinet War Committee the central

⁴⁰*Report of the Machinery of Government Committee* (U.K.), CD-9230, 1918.

⁴¹Lord Hankey, *Government Control in War* (Lees Knowles Lectures, Cambridge, 1945).

⁴²In the United Kingdom the Cabinet Office is entirely separate, although Lord Hankey for some years before his retirement held the two offices of Clerk of the Privy Council and Secretary of the Cabinet.

directing body has never numbered less than twenty. Nor have we adopted the institution of "junior Ministers." In some respects the Parliamentary Assistants resemble Parliamentary Secretaries and Under-Secretaries in Britain but they do not form part of the Ministry. By long tradition Canadian Cabinets meet more frequently, daily during the Parliamentary Session. They have, too, to deal with much that in the United Kingdom would be dealt with by individual Ministers. These and other factors have led to distinctions in Canadian practice. Finally it should be emphasized that, while the Cabinet Office in London is an established institution of thirty years standing, the Secretariat in the Privy Council Office in Ottawa is still in many respects but an innovation. For my part, I believe that, in the crowded history of the past six years, it has assisted materially in creating some of the conditions necessary to the due performance of certain of what the Haldane Committee defined as the main functions of the Cabinet. It would, however, be rash indeed to assert that any final pattern has yet been evolved in this department of the machinery of Canadian executive government.

A. D. P. HEENEY

Ottawa.

APPENDIX A

FUNCTIONS OF THE PRIME MINISTER

Since the administration of Sir Charles Tupper in 1896,¹ it has been common practice for succeeding Ministries to pass a minute of Council regarding certain of the functions of the Prime Minister—the so-called "special prerogatives."

In tabling certain of these orders recently in the House of Commons, in answer to a motion for their production, Mr. Mackenzie King spoke as follows:

"The motion is for a copy of all orders-in-council prescribing the special prerogatives of the Prime Minister. I may say there is nothing unusual about this particular order. It is one that was first adopted by Sir Charles Tupper when he came into office. It has been part of the normal procedure as each new administration came into office to enact similar orders. I have here the various orders that have been passed. The first by Sir Charles Tupper, was passed on May 1, 1896. Then there was one by Sir Wilfrid Laurier, on July 13, 1896, one by Sir Robert Borden, on October 10, 1911, and another by Sir Robert Borden when he was head of the Union government. Then there is one by the Right Hon. Arthur Meighen, approved on July 19, 1920, and one by Mr. Bennett, approved on August 7, 1930. Then there is one by myself, approved on October 25, 1935.

I seem to have overlooked passing a similar order between 1921 and 1926. Mr. Meighen also overlooked his opportunity from June to September of 1926. Again I recommended no order from 1926 to 1930. I am told that the clerk of the privy council has assumed that where a prime minister has been in office on a previous occasion, and is returned and continues in office, the old order still has force.

The only variation in the orders passed by myself and by my predecessors since the time of Sir Charles Tupper has been that in the original recommendation of

¹Order-in-Council P.C. 1853, May 1, 1896.

Sir Charles the railway committee was included in the list of appointments designated as the prerogatives of the Prime Minister in section 4 of the first two orders-in-council. This committee was deleted for obvious reasons from the list of appointments, under P.C. 2437 of October 10, 1911, and from subsequent orders-in-council.

Then in the case of the last two orders-in-council, namely P.C. 1930 of 1930 and P.C. 3374 of 1935, the original wording of section 3 has been slightly altered to read 'recommendations affecting the discipline of the department of another minister' instead of 'the discipline of another department.'

That is the extent of the changes made. I have been told to be sure to inform the house that this list does not include all the prerogatives of the Prime Minister."²

The most recent minute of Council on this subject is P.C. 3374 of October 25, 1935, which reads as follows:

"The Committee of the Privy Council, on the recommendation of the Right Honourable W. L. Mackenzie King, the Prime Minister, submit the following Memorandum regarding certain of the functions of the Prime Minister,—

1. A Meeting of a Committee of the Privy Council is at the call of the Prime Minister and, in his absence, of that of the senior Privy Councillor, if the President of the Council be absent;
2. A quorum of the Council being four, no submission, for approval to the Governor General, can be made with a less number than the quorum;
3. A Minister cannot make recommendations to Council affecting the discipline of the Department of another Minister;
4. The following recommendations are the special prerogative of the Prime Minister:

Dissolution and Convocation of Parliament: Appointment of—

Privy Councillors;
Cabinet Ministers;
Lieutenant-Governors;
(including leave of absence to same);
Provincial Administrators;
Speaker of the Senate;
Chief Justices of all Courts;
Senators;
Sub-Committees of Council;
Treasury Board;
Committee of Internal Economy, House of Commons;
Deputy Heads of Departments;
Librarians of Parliament;
Crown Appointments in both Houses of Parliament;
Governor General's Secretary's Staff;

Recommendations in any Department.

The Committee advise that this Minute be issued under the Privy Seal, and that a certified copy thereof be attached, under the Great Seal of Canada, to the Commission of each Minister."

²*Canadian House of Commons Debates*, unrevised Hansard, April 1, 1946, pp. 449-50.

APPENDIX B

WAR-TIME CABINET COMMITTEES

Order-in-Council P.C. 4017½ of December 5, 1939, formally constituted nine committees of the Cabinet. Of these the Cabinet War Committee is dealt with in the text. The history of the remaining eight committees, together with that of their related agencies is summarized briefly below. Of these eight only two were at all active by early 1942, namely the Committees on Internal Security and on Legislation.

1. *Committee on War Finance and Supply.* This Committee continued active until early 1940. Its functions, as regard finance, however, became in practice the responsibility of the Minister of Finance and his department, assisted by the War Savings Committee of 1940 and Victory Loan Committee of 1941, both superseded by the National War Finance Committee in 1942. Those functions dealing with supply (other than food) became the responsibility of a Defence Purchasing Board and a War Supply Board under the Minister of Finance, the last Board being subsequently transferred to the Minister of Transport. In 1940 the Department of Munitions and Supply was set up under a separate Minister and took over the work of these Boards. The Foreign Exchange Control Board, under the Minister of Finance, was in existence from September, 1939.

2. *Committee on Food Production and Marketing.* A number of special boards were set up operating with emergency powers under the aegis of the Minister of Agriculture. These were the Meat Board (formerly the Bacon Board, 1939), the Dairy Products Board (1940), the Special Products Board (1941), and the Agricultural Food Board (1943). An Agricultural Supplies Board had been constituted prior to the establishment of this Committee in September, 1939.

3. *Committee on Fuel and Power.* These questions became eventually the responsibility of the Minister of Munitions and Supply operating after 1941 through the Coal and Oil Controllers of the Wartime Industries Control Board. The Dominion Fuel Board, a permanent agency, dating from 1930, was transferred from the responsibility of the Minister of Mines and Resources to that of the Minister of Finance in 1941. It was placed under the Minister of Munitions and Supply in 1943 as was the Emergency Coal Production Board which had been established in 1942 under the Minister of Finance.

4. *Committee on Shipping and Transportation.* These problems were in fact shared among several agencies and controllers, namely, the Canadian Shipping Board (1939) and Shipping Priorities Committee (1941) under the Department of Trade and Commerce, the Transport Controller and the Director of Merchant Seamen (assisted by a Committee on Merchant Seamen, 1942), under the Department of Transport and a Controller of Ship and Repairs and Construction under the Department of Munitions and Supply.

5. *Committee on Price Control and Labour.* The field of price control and civilian supply had been entered prior to the establishment of this committee when the War-time Prices and Trade Board was set up in September, 1939. This Board, destined to become the largest war-time agency other than a department, was at first under the general responsibility of the Minister of Labour but was transferred

in 1941 to the Minister of Finance. Assistance to the government in the labour relations field was obtained through a number of agencies, either responsible to the Minister of Labour or attached to the Department of Labour. In the first category were the National Labour Supply Council (1940-2) the National War Labour Board and Regional War Labour Boards (1941), the Western Labour Board (1944)—specifically in connexion with joint Canada-United States defence projects in the North-West—and the Wartime Labour Relations Board (1944). In the second category were the National Registration Branch (set up in 1940 under the Department of National War Services and transferred to Labour in 1942), the Wartime Bureau of Technical Personnel (replacing in 1941 the Voluntary Services Bureau under the Secretary of State), and the National Selective Service organization (1943).

6. *Committee on Internal Security.* This continued in active existence for some time and provided sanction for the necessary interdepartmental collaboration in this field.

7. *Committee on Legislation.* In the early days of the war this committee examined the form and content of all recommendations to Council under the War Measures Act as well as war legislation prepared for submission to Parliament. It was on the authority of this committee that orders of general interest and "legislative effect" were made public, together with proclamations, in booklet form—a duty subsequently performed by the Statutory Orders and Regulations Division of the Privy Council Office.

8. *Committee on Public Information.* This committee was to be concerned with censorship as well as war publicity. These functions, happily were divorced as to administration at an early stage. Following issuance of censorship regulations on September 1 and 2, 1939, a Censorship Co-ordination Committee had been formed on September 3, and in 1942 all branches of censorship were brought together under a Director of Censorship responsible to the Minister of National War Services. Public information, as a separate directorate, was also placed under this Minister in 1940 and remained with him until 1942 when the Wartime Information Board was set up responsible directly to the Prime Minister as President of the Privy Council.

Nicholas d'Ombrain

Cabinet secrecy

Abstract: Cabinet secrecy is a cornerstone of the constitution of the Westminster system of government and is safeguarded by convention, common law and statute law in leading Westminster regimes. Secrecy of cabinet proceedings is very much part of the efficient constitution, but the protections afforded by convention and law are neither well understood nor particularly popular. This article examines the convention and how it differs from the common law and statute law treatments of cabinet secrecy. It considers the essential requirements for cabinet secrecy: collective decision-making; the protection of the views and opinions of ministers; and several related problems of the constitution, including the role of the cabinet as the informal executive, the use of the cabinet as an administrative coordinating mechanism, and – unique to Canada – the use of statute law to remove the courts from their traditional role of determining the balance between individual rights and those of the state. Cabinet secrecy is essential to a system of government where responsible ministers collectively decide the government's policy, but in order to play a proper role in our affairs the convention on secrecy needs to be constitutionally validated by the articulation of its purpose and scope.

Sommaire : Le secret ministériel est une pierre d'angle de la constitution de Westminster, protégé par la convention constitutionnelle, la *common law* et la législation dans les principaux pays du système de Westminster. Le secret ministériel fait intimement partie de la constitution efficace, mais les protections procurées par la convention et la Loi ne sont ni bien comprises ni particulièrement bien vues. Cet article examine la convention et comment elle se démarque de la façon dont la *common law* et le droit législatif interprètent le secret ministériel. Il examine les conditions essentielles du secret ministériel : la prise de décision collective et la protection des points de vue et opinions des ministres. Il examine également plusieurs problèmes connexes de la constitution, y compris le rôle du cabinet comme le pouvoir exécutif officieux; le cabinet comme un mécanisme de coordination administrative et – propre au Canada

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– le recours au droit législatif pour enlever aux tribunaux leur rôle traditionnel qui est de déterminer l'équilibre entre les droits individuels et ceux de l'État. Le secret ministériel est essentiel à un système de gouvernement dans lequel les ministres responsables décident collectivement de la politique du gouvernement, mais pour qu'elle puisse jouer un rôle judicieux dans nos affaires, la convention sur le secret ministériel doit être validée dans la constitution en y stipulant son but et son champ d'application.

Secrecy of cabinet proceedings is one of the cornerstones of the Westminster system of government. The secrecy is protected by convention, the common law and – in differing degrees – statute law in the principal countries with Westminster systems, notably the United Kingdom, Canada and Australia. From time to time, the convention of cabinet secrecy convention is questioned, sometimes in principle but more often for the way in which it is applied. On the one hand, the rule that ministers are entitled to express their views on the government's business in confidence appears to be generally accepted.¹ On the other hand, in an age of "open government," there is a good deal of criticism about anything that is closed. It is probably fair to say that although the convention may be practised and generally accepted, there is not much appetite to defend it.

This article explains the essence of the cabinet secrecy convention. It examines the scope of the convention, explains its place in the theory of the constitution and outlines the conditions necessary for its appropriate application. The convention was established to protect the process of decision-making, which is quintessentially political in a system of government built on the collective responsibility of ministers to the House of Commons. It takes as given that cabinet government is working constitutionally – that ministers are making decisions collectively – and it protects the views and opinions of ministers, not the substance of the matters deliberated or decided. Some may have doubts that collective decision-making is still the predominant characteristic at either level of government in Canada, and others observe that the laws related to the secrecy convention protect far more than the views and opinions of ministers. To be sure, if collective decision-making has been set aside by a prime ministerial *imperium*, the essential precondition for the operation of the secrecy convention will have become similarly obsolete. But if the problem is that the convention has been applied somewhat too broadly, that can be remedied. In short, provided we are being governed constitutionally – that is, by ministers deciding the government's policy collectively – cabinet secrecy remains essential to our constitution. However, remaining essential – a grudging acceptance of a necessary evil – is not good enough if the convention is to continue to play its proper role in our affairs. The purpose and scope of the convention needs to be articulated and its constitutionality validated, and that is the subject of this article.

Cabinet secrecy has undergone a notable evolution in Canada over the past fifty years. Two developments are of particular note: first, there has been a significant expansion of the matters to which protection is afforded; second, the courts in Canada have been removed from any role in determining the validity of claims of cabinet secrecy at the federal level, and there is no duty in the courts or elsewhere to weigh the competing claims of public and private interests in the disclosure of cabinet secrets. The second of these developments is clearly the consequence of Parliament's decisions in the 1970s and 1980s to use its authority to replace the common law functions of the courts in respect of cabinet secrecy. The expansion of the protection is also at least in part the consequence of the decision to legislate the scope of cabinet secrecy beginning in 1970.

The political nature of the cabinet, and the informal nature of its "decision-making," are the qualities that justify its secrecy

Cabinet secrecy is a vibrant part of the Canadian – indeed the Westminster – constitution. But the scope of the convention, particularly its political character, is not well understood and this at times produces bizarre results. Some practitioners are carelessly undermining the convention. It is, for example, becoming common for new provincial premiers to declare such innovations as open cabinet meetings or – most recently – to appoint every member of caucus to a cabinet committee.² Nor is the lack of appreciation limited to first ministers: some judges seem to have considerable difficulty in grasping the difference between a cabinet secret and a substantive secret, and there is vacillation about the prospect of upholding cabinet secrecy against the rights of an accused.

In addition to profound questions about the collective nature of decision-making in the modern cabinet and the role of the courts in balancing public and private interests, cabinet secrecy is challenged by the need to communicate that the cabinet is only the informal executive, and by the implications of the use of the cabinet as an administrative coordinating mechanism. Taken together, these may appropriately be described as problems of the constitution, forming the strands of a Gordian knot around the cabinet that focuses attention on the legitimacy of the secrecy convention.

Cabinet secrecy is widely assumed to be akin to executive privilege, shielding all that is internal to the cabinet. The cabinet secrecy convention does not protect the substantive secrets of the cabinet; rather, it protects the processes whereby ministers arrive at decisions. That is all it protects. The common law and related statutory provisions may provide greater

protection, but to the extent that is so, they exceed the scope of the secrecy convention.

The convention of cabinet secrecy protects the views and opinions of ministers and the process of decision-making from disclosure to political opponents, who could exploit such information to undermine the unity of the government and hence its ability to maintain the confidence of the House of Commons. Closely related is the candour argument, which claims that failure to protect the views and opinions of ministers would have a chilling effect on their willingness to speak their minds freely as required by their oaths as privy councillors.³

A common understanding of the nature of the cabinet and its role in the constitution is helpful to a discussion of cabinet secrecy. Walter Bagehot famously referred to the cabinet as the "efficient" part of Westminster-style constitutions, the part that "in fact, works and rules."⁴ Indeed, the efficient or practical worth of the cabinet remains its key characteristic. Yet, as this celebrated editor of *The Economist* pointed out, "The most curious point about the cabinet is that so very little is known about it."⁵ Although there is a good deal more openness about the organization of the cabinet today,⁶ its proceedings remain secret – if not as secret – as they were when Bagehot made this observation about the British cabinet in the year of the Canadian confederation.⁷

The convention of cabinet secrecy builds on the core elements of the parliamentary constitution. Ministers are collectively responsible to the House of Commons, a democratic, representative and therefore political institution, for the actions of the government. Those actions fall under the authority of ministers individually or the formal executive (the Crown) on their individual advice. Ministers must, however, ensure that individual actions have the support of their colleagues in the ministry. This support is fundamentally political because of the political character of the House of Commons. In order for ministers to collectively agree to support the actions of ministers individually, they require a political process whereby proposals can be advanced, compromises discussed and final decisions arrived at. This is the cabinet decision-making process. For this process to work, ministers must be able to speak frankly without fear that divergent views or disagreements may become known and exploited through the political process, and thus potentially undermine parliamentary confidence in the ministry.⁸

The integrity of the cabinet secrecy convention depends on the constitutional position of the cabinet. The informal and political character of cabinet "decision-making" not only makes secrecy essential to its proceedings but justifiable in an open and democratic society. In the early part of the twentieth century, Sir William Anson, founder of Oxford's law school, MP for the university from 1899 to 1914, and all-round constitutional icon, noted that "[t]he Cabinet shapes policy and settles what shall be done in important matters ... but it is not therefore the executive."⁹ Later, Sir Ivor Jennings, a late-

comer to the subject but nonetheless professor of constitutional law at Cambridge at the time of his death in 1965, explained that "[n]either the Cabinet nor the prime minister, as such, claims to exercise any powers conferred by law. They take the decisions, but the acts which have legal effect are taken by others – the Queen, the Privy Council, a minister, a statutory commission, and the like."¹⁰ Canadian authorities have made the same point: "The prime minister and cabinet ... exercise no formal powers; they decide rather how some regularly constituted authority – the Governor General, the Governor-in-Council, a particular minister – is to discharge functions with which that authority is legally entrusted and concerning which it will, as a matter of custom and convenience, accept direction from the prime minister and the cabinet."¹¹ Such is the informal place of the cabinet in constitutional law, rooted in its political function of establishing and maintaining collective responsibility. The political nature of the cabinet, and the informal nature of its "decision-making," are the qualities that justify its secrecy.

It is important to distinguish cabinet secrecy from other forms of secrecy concerning the business of government. The cabinet secret is concerned with the expression of views and opinions of ministers exchanged in the discussion of substantive matters that become the objects of cabinet decisions or other actions of the government. The operation of the convention on access to the papers of former ministries demonstrates the difference between a cabinet secret and other government secrets. Among its provisions, the convention authorizes the secretary to the cabinet (as custodian of the papers of former ministries) to "inform the incoming government, or any future government, of the decision that was reached in order that government business may be carried on with maximum efficiency, ... without revealing the opinions of Ministers ... nor any differences of opinion between Ministers."¹² Thus, the secrecy attaches to the process whereby decisions are arrived at. A different, or substantive, secrecy attaches to particular types of government information and decisions that may merit secrecy because disclosure would cause harm to particular public interests, such as national security, defence and international affairs.¹³

The significance of secrecy is illustrated by the strict rules imposed by prime ministers against the taking of notes in cabinet, other than by official note-takers in the cabinet secretariat.¹⁴ The guidance provided to Canadian and British ministers by the Privy Council Office and the Cabinet Office, respectively, has stressed that the establishment and maintenance of collective responsibility requires that "Ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached."¹⁵ "Confidentiality ensures that Ministers can frankly express their views before a final decision is made."¹⁶

During the 1970s and 1980s, successive British secretaries of the cabinet,

Sir John Hunt and Sir Robert Armstrong, provided authoritative interpretations of the convention of cabinet secrecy. Hunt captured the essence of the doctrine when he summed up his exposition of the secrecy convention, noting that "Ministers will not feel free frankly to discuss and to surrender their personal and departmental preferences to the achievement of a common view, nor can they be expected to abide by a common decision, if they know that the stand they have taken and the points they have surrendered will sooner rather than later become public knowledge."¹⁷

The convention on cabinet secrecy may be seen at work on a daily basis. Ministers do not disclose the content of cabinet discussions, although there is the exception of the deliberate or self-exculpatory leak, the latter being more prevalent in the United Kingdom than in Canada.¹⁸ Usually, they do not disclose when matters are going to be discussed. Prime ministers regularly remind ministers of the significance of cabinet secrecy, both in mandate letters and from time to time under the cabinet agenda item of "general discussion."¹⁹ Cabinet minutes, which disclose opinions and may reveal differences between ministers, receive special protection, more than is afforded to other cabinet papers. The convention also operates when a minister resigns because of a difference with his or her colleagues in the cabinet. In such circumstances, it is customary for the prime minister to permit the outgoing minister to explain the nature of the disagreement. It is also seen in the rules attaching to the vetting of ministerial memoirs.²⁰

The Xerox machine and the Trudeau government greatly changed cabinet's papers

The political character of protection afforded by cabinet secrecy is further illustrated through the operation of the convention on access to the papers of former ministries, referred to earlier. The essence of the convention is that "[c]urrent Ministers may not see the Cabinet papers of former Ministers of a different political party."²¹ The convention is of relatively recent origin but is well established, being designed explicitly to prevent the political exploitation of the views and opinions of ministers.

There is not much scholarly comment on the convention in part because it dates from the mid-twentieth century.²² However, it is mentioned by Jennings, who, in the context of the imminent postwar change of the British government in 1945, noted that "the ministers of one Government are not entitled to examine the Cabinet documents of their predecessors."²³ The political character of the convention has been recognized by the courts in the United Kingdom and Canada: "[T]here is a long-standing and important constitutional rule that ministers of a government formed by one party are

not allowed to see the documents of a former government" because such papers contain "privately expressed opinions of ministers in a previous government."²⁴ The convention is not only well established in Canada and in the United Kingdom but it has been carefully recorded and indeed elaborated with each change of government in Canada, particularly between opposing parties, since 1957. This was well captured by the clerk of the Privy Council and secretary to the cabinet in his memorandum to Prime Minister St. Laurent at the time of his defeat by Mr. Diefenbaker. Referring to the need to preserve for posterity cabinet and cabinet committee conclusions, minutes and documents, Robert Bryce explained, "In order that these papers may be useful, they have to be written frankly and confidentially, frequently revealing differences of view between Ministers or opinions of Ministers which would not be put on paper if it were felt they would ultimately fall into the hands of members of another political party."²⁵

Significant changes in the common law during the 1960s precipitated the government's decision to provide statutory protection for cabinet secrecy

Since that straightforward declaration of principle, practitioners have tended to expand and make more complex the scope of the convention, whereas the courts have tended in the opposite direction, seeking to narrow and clarify the scope. In the common law cases, there have been frequent references to the certain classes of papers that on their face clearly merit protection, the most frequently mentioned being cabinet minutes.²⁶ Originally, the courts provided almost unlimited protection to any information for which Crown privilege was claimed. But, more recently, both in Canada and the United Kingdom, the courts have expressed doubt about claims of secrecy unless disclosure can be demonstrated to be against the public interest. Parliaments have taken divergent courses. In Australia and later the United Kingdom, the practice has been to define the convention in legislation using the simplest of substantive terminology – "disclosure of deliberations or decisions of the Cabinet" (Australia); "proceedings of the Cabinet" and "the maintenance of the convention of the collective responsibility of Ministers" (United Kingdom). In Canada, Parliament began with a brief but obscure reference to the convention that provided no form of definition. Later, this was elaborated to provide a generally non-substantive definition made up of the records – agendas, memoranda, reports, minutes, decisions, briefing notes – wherein "confidences of the Queen's Privy Council" were likely to be found. The Canadian endeavour to capture in statute the secrecy convention began in 1970.

Indeed, 1970 was a seminal year for cabinet secrecy in Canada. It marked the beginning of an ever-growing bureaucratization of the cabinet process, as well as the suppression of the common law protection afforded cabinet secrets by a more certain form of legislated privilege that ensured control by the executive rather than by the courts. These two measures over time had the effect of expanding significantly the scope of cabinet secrecy, embracing far more than the views and opinions of ministers.

The changes in cabinet process introduced by Prime Minister Trudeau built on the reality that the cabinet is more than a political forum, seminal though that function may be. The cabinet also fulfils administrative functions: it is the forum for the approval of the detailed arrangements for the implementation of the government's policies and programs.²⁷ A cabinet decision is a vital piece of administrative paper, detailing the authorities that have been agreed to, the monies that are to be spent, and the administrative arrangements that are necessary to move from policy to legislation to program design and ultimately program delivery. This administrative function may be detected in the cabinets of the nineteenth century, when the only record of cabinet proceedings was the prime minister's letter to the sovereign (in Canada, to the governor general), but it became much more central when twentieth-century cabinets took on the services of organized secretariats.

The advent of the cabinet secretariat changed much in the day-to-day operations of the cabinet. The introduction of civil servants to the cabinet room, and with them their records, changed the way in which government worked. The cabinet remained at core a political forum for the hammering out of agreed policies, but the making of policy was now recorded in progressively greater detail. A system of records grew up in the 1940s and had by the 1950s assumed more or less the skeleton of what we recognize today as the cabinet paper system: a memorandum from the minister outlining a proposed initiative; a cabinet committee agenda, minutes and report on the discussion among ministers; and minutes of the cabinet and a record of the decision agreed to. Civil servants from departments began to attend cabinet committees, although it was rare for other than the cabinet secretariat staff to be present at cabinet meetings.

Although these were significant changes in cabinet procedure, the volume of typewritten and carbon copy (later mimeographed) papers was moderate. Ministers generally managed to make their case in two or three pages, and the cabinet conclusions (a combination of minutes and decisions) were generally no more than a half-dozen double-spaced, legal-size pages. And, as noted, when the government changed in 1957, the concern was to protect the views and opinions of ministers from political exploitation, not the cabinet paper system as such, and in particular not the decisions that had become so necessary for the proper and continuous functioning of government.

The Xerox machine and the Trudeau government greatly changed cabinet's papers. Beginning with Trudeau's "cabinet planning system," the papers of the cabinet took on increasingly impressive physical proportions, and it was widely assumed that ministers applying themselves to their duties did not have the time or need to read what had become papers written by civil servants for other civil servants to read, negotiate over, and implement in accordance with whatever political direction they received from ministers. This is not to say, however, that much of the content of the cabinet's papers does not qualify for protection under the secrecy convention. The federal cabinet makes in the order of 200 to 300 substantive decisions a year – which may run anywhere from three to 300 pages – on the basis of memoranda from ministers.²⁸ While these may disclose little in the way of ministerial opinion other than the sponsoring minister's recommendation, other cabinet papers, such as agenda, committee reports and some decisions disclose the process whereby proposals are debated and decisions reached. Cabinet and committee minutes provide insight into the various options considered and positions taken amid the twists and turns leading to a decision. Briefing notes for the prime minister and committee chairman will routinely disclose differences between ministers. The Privy Council Office noted in the 1970s that the cabinet's political and administrative functions have become "enmeshed ... as a consequence of the growing complexity of the cabinet's business and the elaboration of support services provided by its secretariat."²⁹ The development of this elaborate, structured and technical approach to cabinet decision-making gathered steam during the early 1970s coincident with the passage into statute law of the secrecy convention.

Significant changes in the common law during the 1960s precipitated the government's decision to provide statutory protection for cabinet secrecy. In the late nineteenth century, it was commonplace for ministers and other office-holders to claim protection from discovery in a court of law of almost any government document. The courts sustained these claims, establishing over time a rule of evidence known as "Crown privilege." For many years, Crown privilege was routinely claimed in respect of what were then the principal activities of the state: the maintenance of law and order and defence of the realm, including its diplomatic relations.³⁰ Indeed, cases of Crown privilege do not explicitly mention cabinet secrecy until well into the twentieth century, and then only by way of illustrating a class of papers that self-evidently should not be subject to production. Crown privilege "provides that evidence that is relevant and otherwise admissible must be excluded if its admission would be injurious to the public interest."³¹

As is the nature of the common law, the rules of evidence evolve with successive judgements. The nineteenth-century view was that "it is the duty of the Courts to refuse discovery of documents which are ascertained to be state papers and as such privileged from inspection."³² But the common law on

this matter changed significantly between the 1940s and the 1970s. In the earlier period, the courts did not think it appropriate to substitute their own opinion for that of a minister or other officer of state, even though the information in question was nothing so elevated as that thought to be found in cabinet papers.³³ The high tide of Crown privilege was achieved in the judgment in 1942 in the now-celebrated case of *Duncan v. Cammell Laird*. The documents in this case were technical in nature, involving a marine disaster (the sinking of the submarine *Thetis* on its trials in the summer of 1939). In the course of his speech on behalf of his fellow law lords, Viscount Simon took the position that "[w]hen the Crown ... is a party to a suit, it cannot be required to give discovery at all. No special ground of objection is needed. The common law principle is well established."³⁴ Even so, although Simon asserted the duty of the court to uphold claims of Crown privilege, he made clear that the exercise of that duty lay with the court, not the executive.³⁵

In 1953, the Supreme Court of Canada, rejected the Crown's assertion of privilege similar to that set out in the *Duncan* case.³⁶ This decision began to restore to the common law the principle that the courts have a duty to weigh competing claims and that justice could not be served by blind acceptance of claims of privilege by one party – the Crown. It was not, however, until the 1960s under the leadership of Lord Denning that the common law was brought fully into accord with the rules of natural justice.³⁷ In the first of a series of cases, Denning challenged the House of Lords' decision in the *Duncan* case, asserting, "After all, it is the judges who are the guardians of justice in this land: and if they are to fulfil their trust, they must be able to call on the Minister to put forward his reasons so as to see if they outweigh the interests of justice."³⁸ Later in 1964, Canada's Supreme Court heard an appeal that allowed it to reinforce its own decision of 1953 and the more recent declaration by Lord Denning of the duty of the courts to consider the public interest in respect of claims of Crown privilege.³⁹ It took another four years for the House of Lords formally to overturn Lord Simon's statement of the law on Crown privilege in the *Duncan* case. In *Conway v. Rimmer*, the law lords reasserted the duty of the court to weigh the competing claims and, if necessary, to examine documents and even to order production.⁴⁰

The *Conway* case ended the traditional common law treatment of Crown privilege. Indeed, within a few years, the very term had been expunged from the common law, its echo of divine-right splendour being replaced with the utilitarian phrase "public interest immunity."⁴¹ The decision of the House of Lords had an even more far-reaching consequence in Canada, where the federal government decided to supersede this unwelcome development in the common law by enshrining its understanding of Crown privilege in statute law.

The government incorporated the relevant provision in the new Federal Court Act, which was brought forward in 1970 as part of a general reform of

federal courts that replaced the Exchequer Court of Canada with the Federal Court of Canada.⁴² The bill was considered by Parliament during the "October Crisis" in the autumn of 1970. In the course of debate, the minister of justice, John Turner, referred to the *Conway* case and the reversal of the former view that all claims of privilege by the executive should be determinative without examination by the court.⁴³ He also suggested that the application of an absolute privilege for international relations, defence and security, federal-provincial relations and cabinet secrecy was reasonable.⁴⁴ In doing so, perhaps the minister had in mind the comments of the House of Lords that papers in such categories would no doubt automatically be exempted from production. He did not, however, point out that the House of Lords had explicitly reserved to the courts the right and duty to make this decision.

Section 41 of the new act set out the statutory regime to govern Crown privilege as it related to the federal government at all levels of the judicial system. Under the new provision, the courts were to continue to have authority to examine and order production of documents for which privilege was claimed by ministers except in certain matters, including cabinet secrecy, referred to for the first time as "a confidence of the Queen's Privy Council for Canada."⁴⁵ This term was not defined, but between 1976 and 1983 events led the government to identify the types of documents where such "confidences" were likely to be found. This began when the secretary of state issued a green paper on access to government documents in June 1977.⁴⁶ Although ultimately the green paper's proposals were to lead to legislation that elaborated on the phrase "Privy Council confidence," the next step in the evolution of the statute law concerning cabinet confidentiality was sparked by a public inquiry that sat between 1977 and 1981.

[S]tatute law is a clumsy and seldom successful way of capturing constitutional convention and practice

The Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police (the McDonald Commission) into "the extent and prevalence of investigative practices or other activities involving members of the R.C.M.P. that are not authorized or provided for by law"⁴⁷ became the first in Canada's history to be given extensive access to cabinet papers and other documents relating to the making of policy at the highest levels. Mindful of the precedent set by providing access to such documents,⁴⁸ the government devised a process whereby papers of this character could be formally conveyed to the commission for its use in hearings. For convenience's sake, the government referred to these documents as "government documents," and its counsel described them for the commission's benefit in

the form of a list of various types of documents including "Cabinet agendas, memoranda, minutes and decisions."⁴⁹ Unrecognized at the time, this list constituted the first attempt to provide a definition of the phrase "confidence of the Queen's Privy Council for Canada." The need for the list became even greater in the summer of 1979, when the Liberal government was replaced by Prime Minister Clark's minority administration. As was by now normal and conventionally established, Prime Minister Trudeau's papers were placed in the custodial care of a senior official (exceptionally the secretary to the cabinet for federal provincial relations, R. Gordon Robertson), and the conventional practice was observed that these papers would not be accessible to Clark unless Trudeau first gave his permission. This arrangement presented a novel problem for dealing with the commission's demands for papers. Nonetheless, a system was devised, building on the now-customary exchange of letters concerning the convention on access to the papers of the outgoing ministry.⁵⁰ Thus, by 1980, principally because of the McDonald Commission, the term "confidence of the Queen's Privy Council for Canada" was beginning to take on a particular meaning, defined principally by the types of documents where "confidences" were likely to be found. These developments coincided with the growing pressure in Parliament and elsewhere to provide a statutory right to "freedom of information," which was to lead in time to a further elaboration of the statute law regarding cabinet secrecy.

In July 1982, royal assent was given to legislation to govern the right of public access to government documents. This initiative had been under more or less active consideration since 1976. The many exemptions in the new law were defined in considerable detail, and this applied no less to those concerning federal-provincial relations, international relations, and defence and security. No longer was information of this type protected by the hitherto conclusive affidavit procedure set out in Section 41(2) of the Federal Court Act. Henceforth, it would be necessary for the heads of government institutions to explain and, if need be, defend decisions to claim exemptions. This need to demonstrate injury explained the extensive definitions – and defences – set out in the new legislation. Figuratively speaking, all that remained of Section 41 of the Federal Court Act were "confidences of the Queen's Privy Council for Canada." The new legislation did not provide an exemption for this remaining class of documents because it expressly did not apply to them, and, for greater certainty, the act provided a list of the sorts of document where these confidences were likely to be found.⁵¹ The list reflected the then current system of cabinet papers administered by the Privy Council Office, which despite the recent innovation of the "discussion paper" had remained largely unaltered since the 1940s. The list also echoed its origins in the description of "government documents" provided to the McDonald Commission and the detailed description of cabinet papers that

first appeared in the 1979 exchange between incoming and outgoing prime ministers dealing with the convention on access to papers of former administrations.

As a consequence of the provisions of the Access to Information Act, Section 41 of the Federal Court Act was repealed and new provisions added to the Canada Evidence Act. These authorize a superior court to examine and in the public interest to order production of all documents in respect of which an objection to disclosure is made except for claims of injury to international relations, national defence or security, and confidences of the privy council. Claims respecting international relations, national defence or security may be determined under the authority of the chief justice of the Federal Court.⁵² As for confidences, the amendments provided absolute immunity for claims of cabinet secrecy made by a minister or by the clerk of the privy council and replicates the wording respecting "a confidence of the Queen's Privy Council for Canada" found in the Access to Information Act cited above.

The new definition reflected the then current composition of the cabinet paper system: it made no attempt to provide a substantive definition (such as the views and opinions of ministers) but rather declared a confidence to be anything that resided in particular classes of papers used by the cabinet in the transactions of its business – agendas, memoranda and so on.

"[W]hat is so important about secret government that it must be protected even at the expense of injustice in our courts?"

The effect of the new definitions in the two acts was far-reaching. With detailed classes of documents statutorily enacted, the legal response was to claim privilege (now restyled by the courts as "public interest immunity") for any paper that fell into one of these classes, regardless of content. An industry has been created in Ottawa to review and claim immunity for these classes deemed by Parliament to constitute a confidence of the privy council. The problem today is that these perverse consequences have come to be seen as the norm by many of those engaged in protecting the secrets of the cabinet. Detailed statute law is a clumsy and seldom successful way of capturing constitutional convention and practice. There has been no exercise of discretion: all records covered by the acts are routinely withheld. This does not mean that the privilege is being claimed inappropriately, still less carelessly or mendaciously. It means simply that the law is being applied as Parliament prescribed.

The United Kingdom and Australia have also experimented with statutory provisions that attempt to capture the cabinet secrecy convention.

Although Canada alone has a statutory provision governing protection of cabinet secrets in courts of general jurisdiction, all three countries have statutes that govern the treatment of cabinet secrets by parliamentary auditors, including auditors general, information commissioners and ombudsmen. As discussed, the practice in Canada has generally been to deny access to "confidences of the Queen's Privy Council" and to describe documents where such are to be found. In Australia and the United Kingdom, the tendency is towards providing a brief substantive definition of the information that is entitled to protection, on the lines of "the deliberations of the cabinet" and, most recently in the United Kingdom, "the maintenance of collective responsibility."

Australia has had ombudsman's legislation since 1976. The act provides exemptions for defence, security, international relations, and Commonwealth-state relations, as well as matters related to the "deliberations or decisions" of the cabinet and the "deliberations or advice" of the executive council.⁵³ The Administrative Decisions (Judicial Review) Act, 1977 includes a certificate procedure to protect documents that would "involve the disclosure of deliberations or decisions of the Cabinet or a Committee of the Cabinet to administrative tribunals."⁵⁴ Note, however, that the act does not attempt to displace the common law rules on privilege/immunity in the event the matter goes to the appropriate court.⁵⁵ The Administrative Appeals Tribunal Act, 1975 contains a similar certificate procedure covering the usual categories of papers (defence, security, international relations) including those that "would involve the disclosure of deliberations or decisions of the Cabinet or a Committee of the Cabinet."⁵⁶ It differs, however, in that the documents may be disclosed to the tribunal, which is under obligation "to ensure that the information or the matter contained in the document is not disclosed to any person other than a member of the Tribunal as constituted for the purposes of the Tribunal."⁵⁷

Australia's Freedom of Information Act, 1982 contains an absolute exemption for cabinet documents when certified by the secretary to the department of the prime minister and cabinet. The exemption applies to documents and official records of the cabinet and "a document the disclosure of which would involve the disclosure of any deliberation or decision of the Cabinet."⁵⁸ A review of the act by the Australian Law Reform Commission concluded that the finality of the government's certificate should continue: "Given the fundamental role of the Cabinet in the Westminster system of government it is appropriate that the ultimate responsibility for the exemption of Cabinet documents lies with Ministers."⁵⁹ On the other hand, it is interesting that Australia's Auditor General Act does not restrict the auditor general's access to cabinet information, but there is a certificate procedure to prevent publication of certain matters including "disclosure of deliberations or decisions of the Cabinet or a Committee of the Cabinet."⁶⁰

The United Kingdom has generally avoided providing specific statutory protection for cabinet secrets from parliamentary auditors, relying instead on general understandings of what is and is not accessible to auditors. But there are exceptions. The ombudsman, established under the Parliamentary Commissioner Act, 1967, has statutory access to "any relevant document other than one relating to the proceedings of the Cabinet and its committees."⁶¹ Most interestingly, in 2000, the British Parliament passed the Freedom of Information Act, 2000, to govern a new regime for access to information, including the creation of an information commissioner. The act provides protection for cabinet secrets. It does this by protecting "any communications between Ministers of the Crown ... and includes, in particular, proceedings of the Cabinet or any committee of the Cabinet," as well as information that "would, or would be likely to, prejudice ... the maintenance of the convention of the collective responsibility of Ministers of the Crown, or ... the free and frank provision of advice, or ... the free and frank exchange of views for the purposes of deliberation."⁶²

But these British and Australian statutes are of limited application, and, as feared by those who framed Canada's initiative to freeze the law on cabinet secrecy, the common law has continued to evolve both in the United Kingdom and Australia, as it has in respect of provincial jurisdiction in Canada. During the 1970s, cases in the United Kingdom and Australia introduced new strands of argument, including the idea that the need to protect cabinet secrecy declined with the passage of time⁶³ and that criminal proceedings placed a particular burden on the courts to weigh the merits of claims related to cabinet secrecy.⁶⁴ Cases followed in the Court of Appeal and the House of Lords moved the courts from asserting a right to examine claims of privilege to actually examining documents for which privilege had been claimed.⁶⁵ Judges began also to question claims of privilege related to the hitherto sacrosanct example of documents entitled on their face to protection: cabinet minutes. In *Burmah Oil*, the House of Lords questioned that "the secrecy of the inner workings of the government machine" was so "vital a public interest that it must prevail over even the most imperative demands of justice." Even a cabinet minute should be protected only if disclosure would betray "some secret of high importance." Otherwise, "what is so important about secret government that it must be protected even at the expense of injustice in our courts?"⁶⁶

Canadian courts have continued to contribute to the development of the common law on cabinet secrecy as a result of cases arising from provincial jurisdiction. In 1982, the Supreme Court of Canada refused to sustain a claim of privilege for cabinet papers and testimony by a former provincial premier. Even cabinet documents enjoyed no absolute immunity, and the court unambiguously asserted that "it is the role of the courts, not the administration, to determine whether disclosure of documents would be injurious to

the public interest."⁶⁷ In 1986, the Supreme Court again rejected a claim of privilege, this time in relation to the papers of the Ontario cabinet. Justice Gérard La Forest agreed that cabinet deliberations deserved protection in principle but objected to "the absolute character of the protection accorded their deliberations or policy formulation without regard to subject matter, to whether they are contemporary or no longer of public interest, or to the importance of their revelation for the purpose of litigation."⁶⁸ Moreover, he expressed scepticism about arguments based on candour, attaching more weight to the content of documents.⁶⁹ On the larger questions of principle, La Forest, on the basis of a review of the jurisprudence since the *Conway* case, concluded, "In the end it is for the court and not the Crown to determine the issue."⁷⁰

The courts and others have remarked on the expansion of the matters to which the convention is said to apply

Canadian courts have also dealt with the various challenges concerning the constitutionality of the statute law, and they have done so cautiously for the most part. In 1982, before the adoption of the Charter, the Supreme Court upheld Section 41(2) of the Federal Court Act (in part predecessor to Section 39) as a valid exercise of the sovereignty of Parliament that was neither a threat to judicial independence, nor contrary to the equality before the law provisions of the Canadian Bill of Rights, nor unconstitutional because it somehow interfered with provincial responsibility for the administration of justice.⁷¹ This was a significant decision principally because it defined the limits of the arguments that might be advanced against the validity of the section. There was no room to argue that Parliament did not have the power to set aside the common law of Crown privilege – apart (post-1982) from Charter and other broad constitutional arguments, such as judicial independence, that left the possibility of arguing that Section 39 did not necessarily override other statutes. This was tested by the auditor general of Canada in the late 1980s in an attempt to force the government to provide him with information about the acquisition of a private company (Petrofina) by a Crown corporation (Petro-Canada), but ultimately the Supreme Court supported the use of Section 39.⁷²

Judgements of the Federal Court concerning the constitutionality of Section 39 were handed down in 1999 in an action arising from incidents at the 1997 APEX summit in Vancouver, in which the plaintiffs alleged improper governmental direction of the RCMP, which had been responsible for the security of the event involving numerous heads of government. In the course of proceedings, certificates were issued pursuant to Section 39. The

plaintiffs argued that Section 39 was beyond Parliament's power because it violated "fundamental, unwritten principles of the Canadian Constitution [that] ... include the independence of the judiciary, the rule of law and the separation of powers."⁷³ Both at trial and appeal, the plaintiffs lost on all points. Justice Barry Strayer for the Appeal Division supported his trial division colleague, Justice William McKeown, and elaborated on his decision. The decision forthrightly addresses the constitutionality of Parliament's action in removing the duty of the courts to weigh competing interests of the individual and the state, and it firmly rejects the erroneous application to responsible government of the doctrine of separation of powers.

Strayer reasoned that the Constitution is the supreme law of the land, that under the Constitution parliamentary supremacy had not been set aside by the Charter, and that therefore Parliament was entirely within its rights to legislate Section 39. "Both before and after 1982 our system was and is one of parliamentary sovereignty exercisable within the limits of the written constitution."⁷⁴ Given the supremacy of the Constitution and the central role of Parliament within the Constitution, it would be necessary to establish that in exercising its powers Parliament had "infringed a constitutional limit (express or implied) on its power."⁷⁵ As to whether the provisions of Section 39 were themselves beyond the power of Parliament, Strayer noted that the plaintiffs had been wrong to argue that Section 39 was unconstitutional because it was at variance with the common law. He considered it entirely within the power of Parliament "to define privileges of the federal Executive in the furtherance of the well-established and well-accepted principles of Cabinet secrecy. In the absence of some clear and compelling constitutional imperative to the contrary the legislation is valid and effective."⁷⁶ Strayer also dismissed the claims that Section 39 violated the "separation of powers," demonstrating plainly that such separation is not a characteristic of Westminster constitutions and that the reference in the preamble to a "constitution similar in Principle to that of the United Kingdom" recognized the importance of responsible government, "that is, a system where the Executive would be responsible to the legislature. The very concept was the antithesis of separation of powers."⁷⁷ He gave similar short shrift to the argument that Section 39, in circumscribing the right of judicial bodies to examine documents, undermined the independence of the judiciary, which he noted has been circumscribed by the Supreme Court to encompass such matters as the "security of tenure, the financial security, or the administrative independence of judges."⁷⁸

In another case, the Supreme Court in July 2002 concluded that "there is no basis upon which to find that s. 39 of the *Canada Evidence Act* is unconstitutional."⁷⁹ With seven of her colleagues concurring, Chief Justice McLachlin noted that a certificate taken by the clerk or a minister must be related to documents that are indeed confidences, must be made out as a "bona fide

exercise of delegated power," and must deal with information that has not already been disclosed. McLachin added that the clerk or minister must be satisfied that it "is information which the government should protect taking into account the competing interests in disclosure and in retaining confidentiality."⁸⁰ This duty to weigh, in her view, meant that "s. 39 has not substantially altered the role of the judiciary from their function under the common law regime," presumably because the judge must be satisfied that such a weighing of interests has occurred.⁸¹ This meant that "s. 39 does not offend the rule of law or the doctrines of separation of powers and the independence of the judiciary,"⁸² and this apparently makes it constitutional. Justice L'Heureux-Dubé dissented on the matter of a duty to weigh, taking the position that the clerk or minister is obliged only to determine that the document is a cabinet confidence and that "it is information that the government wishes to protect,"⁸³ but she did not use this to quarrel with the consequential conclusion about the constitutionality of Section 39.

The courts have not had to confront the question of whether Section 39 is somehow contrary to Charter – as distinct from broad constitutional – rights. Two other points stand out: first, the courts have upheld the authority of Parliament to adopt Section 39 and more generally to legislate in ways that do not reflect the state of the common law; second, the courts have not attempted to square the dichotomy between the duty of the courts to determine finally the balance between private and public interests at common law and the setting aside of that duty in respect of cabinet secrecy as a result of Parliament's action in enacting Section 39 of the Canada Evidence Act. As for the statutory provisions themselves, there has been an evident progression from common law *dicta* to Section 41(2) of the Federal Court Act with its undefined reference of "confidence of the Queen's Privy Council for Canada," to the provisions in Section 39 of the Canada Evidence Act and Section 69 of the Access to Information Act. As noted, these do not provide so much a definition of a "confidence" as a catalogue of papers where such may be found.

The courts and others have remarked on the expansion of the matters to which the convention is said to apply. In one case, the Federal Court commented on changes in the cabinet records system that appeared to result in information being withheld for purely technical reasons, since the information now appeared in one of the classes of documents set out in the statutory definition of a Privy Council confidence instead of elsewhere.⁸⁴ In another, before the British Columbia Court of Appeal, where the claim was made for documents several of which had already been disclosed inadvertently, one of the judges expressed concern that the certificate was being applied in certain instances to "papers that are used at some lower level to provide a foundation for Cabinet papers" instead of just to those "actually put before the Cabinet."⁸⁵ The information commissioner, who has challenged the govern-

ment in the courts on the scope of its claims, has suggested extensive reforms to the Access to Information Act that would narrow the scope of cabinet secrecy and bring such claims under his review authority.⁸⁶ In particular, he favours a somewhat more substantive definition that would, while including a list of "generic types of records" similar to that now in the act, include reference to "records which would reveal the substance of deliberations of Cabinet or one of its committees."⁸⁷ The commissioner has declared that "numerous instances have arisen where the government has certified information to be a Cabinet confidence when the information clearly does not qualify."⁸⁸

A recent report on revisions to the federal access-to-information regime has – like earlier reports of the federal information commissioner – recommended measures to narrow the scope of the application of the statute that deals with the non-disclosure of cabinet secrets.⁸⁹ Although these reports share the laudable objective of supplementing if not replacing the shopping list of classes of documents with a substantive definition of a cabinet secret, they do not appear to grasp clearly that what needs and merits protection are the political secrets of the cabinet. As with the courts, such reports and reviews do not come to grips with the central question about the legitimacy of cabinet secrecy: how is it possible to permit a secret of government to override the rights of an individual, particularly in the context of a criminal proceeding where the consequences of a wrongful conviction have far-reaching consequences?

The answer lies in an appreciation of the nature of the cabinet process: its informal and political character. Its decisions are of course highly "efficient," but they are not the legal basis for executive action. The latter is to be found in an array of instruments that are not – or should not be – cabinet secrets.⁹⁰ These include orders-in-council, documents issued under the authority of the governor general (and, rarely, the Queen), and ministerial orders and directives pursuant to statute. To be sure, few practitioners would be able to articulate this distinction between the informal cabinet and the formal executive. Moreover, although constitutional authorities draw the distinction between the political character of the cabinet and the formal executive functions of the Crown or those who act in the name of the Crown, they do not examine the implications of this distinction, one of which is that the informal nature of the cabinet is central to justifying the secrecy of its proceedings.

The courts have not addressed the distinction and have instead conducted a discourse on whether cabinet secrets – as the deliberations of the executive – ought to be protected from disclosure even at the cost of injustice. The idea that somehow cabinet's business ought to be justiciable presents far from trivial threats to the secrecy convention. Learned commentators have recognized the inherent problems of such an approach,⁹¹ something that to date has not engaged the attention of the Supreme Court of Canada. And yet, it is

the informal and political character of the cabinet that justifies the practice of secrecy and keeps the cabinet out of the courts. The distinction between the political and the formal executive is critical because, in an era of "open government" and the Charter, secrecy is unlikely to outweigh competing claims for information necessary to the proper administration of justice. Judges have not considered whether there is a distinction between the cabinet and the formal executive.⁹² And to date the Supreme Court has not forthrightly addressed the problem of the executive exercising the judicial duty to determine where justice lies in matters involving the federal cabinet.

Canada's version of Westminster democracy is being eroded by lack of appreciation – and, hence, respect – for the conventions of responsible government and the important principles of constitutional government they underpin

Although the distinction between the cabinet and the formal executive (governor-in-council and ministers) is central, it is far from adequate as the sole basis for protecting cabinet secrecy. It is perhaps the foundation stone, but cabinet practice – maintaining severable records and the availability of other means of establishing the facts (public documents such as orders-in-council) – is essential if cabinet secrecy is to survive in the face of growing scepticism. Cabinet decisions are formally given effect by ministers individually or by the governor-in-council or the governor general on the advice of ministers, and proof of such action is publicly available through ministerial orders and orders and minutes of the committee of the privy council. Litigants seeking to access "confidences of the privy council" are generally trying to establish whether the government made a decision that in some way affected their interests. They need access to formal decisions, and these are generally available (in a typical year, roughly 2,500 orders and minutes of council are gazetted).⁹³ Unfortunately, not many litigants have a clear appreciation of the distinction between the informal political functions of the cabinet and the actions of the formal executive. Some litigants believe factual material in cabinet documents will establish proof of their contentions, and those who are simply curious seek access to the factual material considered by the cabinet in making its decisions. And, of course, cabinet memoranda (and many reports and decisions) contain large numbers of facts and few expressions of the views and opinions of ministers. (This has been recognized since the mid-1980s by the arrangements made to provide the auditor general with access to the "analysis" portions of cabinet memoranda.⁹⁴) In considering the rights of individuals before the courts, the political process

of the cabinet is not likely to be relevant in the preponderance of litigation: "It is important to realize that what is being sought from the government is *facts*. A litigant requires facts in order to proceed at trial. Facts are the heart of the legal system and without them a trial would be a mockery. ... The administration of justice needs facts."⁹⁵

Cabinet practice is, therefore, central to maintaining the secrecy convention, and this includes ensuring the centrality of its political functions in reconciling the views and opinions of responsible ministers. A paper system is needed that segregates fact from process and opinion. A definition that ties cabinet secrecy to the views and opinions of ministers – or the maintenance of the collective responsibility of ministers – would protect the essence of the secrecy convention while removing the absolute barrier to the production of factual material contained within the cabinet papers system. Such a substantive definition, dropping the current "shopping list" of records that may or may not contain cabinet secrets and that may evolve or disappear over time, would provide protection at least in principle for the views and opinions of ministers wherever found and in whatever form.

There is no doubt that the law in Canada has moved far beyond the protection of the political secrets of the cabinet as a political deliberative body. When the law seeks to codify and classify, it can produce bizarre results: thus, under the law, a technical paper annexed to a minister's cabinet memorandum may be considered a cabinet secret and thus immune from production; whereas a memorandum recording the cabinet secretary's instructions from the prime minister concerning a dispute between ministers may not be immune. Can anyone doubt which paper if disclosed would bring joy to the hearts of the government's opposition in the House of Commons? The provisions of Section 39 of the Canada Evidence Act and Section 69 of the Access to Information Act prevent the disclosure of facts, as well as protecting the decision-making process. Preventing the disclosure of facts does not conform to the purpose of the cabinet secrecy convention. Moreover, the breadth of these statutory provisions is undermining the legitimacy of the convention.

The courts in Canada have held the application of cabinet secrecy through statute law to be legitimate. The current law is, however, badly framed because it has strayed far from the central purpose of the cabinet secrecy convention to protect the views and opinions of ministers from exploitation by their political opponents. The convention needs to be reasserted in the statute law.

More fundamentally, however, measures are required to reinforce the legitimacy of cabinet secrecy before the court of public opinion. As Donald Savoie has argued, there is doubt that the cabinet continues to fulfil its central role of uniting ministers in order that they may be collectively responsible for government.⁹⁶ If indeed cabinet is no more than a sounding board, a

pep-talk session for the senior members of the caucus, one is bound to ask whether it still merits absolute immunity from the disclosure of its proceedings, still less factual material laid before it. The legitimacy of cabinet secrecy depends foremost on the most fundamental of building blocks of the Westminster constitution: that the executive is collective, made up of ministers exercising their individual responsibilities in a concerted way that maintains the support of the House of Commons.

There is no doubt that the cabinet of today is greatly changed from that of Lord Salisbury or Mackenzie King or even Lester Pearson. But is it sufficiently the same in its essence to justify the retention of cabinet secrecy? If it is, then greater discretion needs to be exercised in claiming immunity from the disclosure of its proceedings. If it is not, then the problem goes beyond the protection of the secrecy convention to the fundamentals of responsible government.

The problems of the constitution presented at the beginning of this article remain. There is slight appreciation of the cabinet as the informal, political executive, and this extends even to the highest levels of the judiciary. To a degree this is understandable, given the problems associated with the development of the cabinet as the key element in the administrative coordination of the government. This strand of the Gordian knot is itself entwined in the cabinet papers, which contain relatively few views and opinions of ministers but which are treated under statute in Canada as if they did. And the certificates claiming immunity for cabinet and cabinet-related papers run counter to the rules of justice that traditionally have made the courts the arbiter between the individual and the state.

Unravelling this knot may well require some amendments on the lines proposed by others and on the lines of statutory provisions used in the United Kingdom and Australia. Canada would do well to heed Bryce's advice in 1957, when he asked St. Laurent and Diefenbaker to agree to protect cabinet papers that reveal "differences of view between Ministers or opinions of Ministers which would not be put on paper if it were felt they would ultimately fall into the hands of members of another political party."⁹⁷

Canada's version of Westminster democracy is being eroded by lack of appreciation – and, hence, respect – for the conventions of responsible government and the important principles of constitutional government they underpin. The political and informal character of the cabinet lies at the heart of the conventions of the constitution. The cabinet secrecy convention is the foundation for the maintenance of collective cabinet responsibility, but if cabinet secrecy is to remain part of our constitutional arrangements, it is essential that the cabinet remain the mainspring of government. Vigilance is required to ensure that the cabinet fulfils its political functions of making responsible government work, for which purposes the protection of its political secrets is not only justified but also essential to parliamentary democracy.

Notes

- 1 "The idea that Cabinet proceedings are basically secret has nothing new about it." United Kingdom, Committee of Privy Counsellors on Ministerial Memoirs, *Report*, Cmnd. 6386, January 1976 (London: HMSO, 1976), p. 13.
- 2 See Ontario, "A real, positive change in how government works," *Press Release from the Office of Premier-designate Dalton McGuinty*, 22 October 2003 (Toronto: Queen's Printer, 2003).
- 3 "I, XYZ, do solemnly and sincerely swear (declare) that I shall be a true and faithful servant to Her Majesty Queen Elizabeth II, as a member of Her Majesty's Privy Council for Canada. I will in all things to be treated, debated and resolved in Privy Council, faithfully, honestly and truly declare my mind and my opinion. I shall keep secret all matters committed and revealed to me in this capacity, or that shall be secretly treated of in Council. Generally, in all things I shall do as a faithful and true servant ought to do for Her Majesty." P.C. 1999-1441, 3 August 1999.
- 4 Walter Bagehot, *The English Constitution* (London: Oxford University Press, [1867] 1958), p. 4.
- 5 *Ibid.*, pp. 12-13.
- 6 It was not until 1992 that the British acknowledged the existence and membership of the standing committees of the cabinet. See Stanley de Smith and Rodney Brazier, *Constitutional and Administrative Law*, 7th edition (London: Penguin, 1994), p. 188. In Canada, the practice of disclosing the subject-matter and membership of standing committees was first introduced in 1979. Hitherto such matters were considered "internal to the cabinet." One practical reason for secrecy was to reduce the lobbying by interest groups to get "their" minister appointed to a particular committee.
- 7 Bagehot's "efficient" cabinet was contrasted with the dignified Crown: "The dignified parts of government are those which bring it force - which attracts its motive power. The efficient parts only employ that power." Bagehot, *The English Constitution*, p. 4.
- 8 See Sir William Anson, *The Law and Custom of the Constitution*, Vol. II (Oxford: Clarendon Press, 1922), p. 156; Sir Ivor Jennings, *Cabinet Government* (Cambridge: Cambridge University Press, [1959] 1965), pp. 2-3; J.R. Mallory, *The Structure of Canadian Government* (Toronto: Macmillan, 1971), p. 62; R. MacGregor Dawson and Norman Ward, *The Government of Canada* (Toronto: University of Toronto Press, [1947] 1970), pp. 171-72; Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (Don Mills, Ont.: Oxford University Press Canada, 1991), pp. 65-8. (A statement by Lord Hunt's can be found in the text at superscript 18, and a statement by Lord Armstrong can be found in note 18.) Canada, Privy Council Office, *Responsibility in the Constitution* (Ottawa: Supply and Services Canada, [1977] 1993), p. 45.
- 9 Anson, *The Law and Custom of the Constitution*, p. 156.
- 10 Jennings, *Cabinet Government*, pp. 2-3.
- 11 Dawson and Ward, *The Government of Canada*, pp. 171-72.
- 12 Bryce to St. Laurent, 14 June 1957. Exhibit H to Affidavit by Ward Elcock, 24 November 1989, In the Federal Court of Appeal, In the Matter of an Appeal from the Trial Division etc., in *Attorney General of Canada v. Central Cartage Company et al.*, Court File No. A-952-88 (T-9047-82).
- 13 The distinction was captured in an order-in-council that dealt with the cabinet papers of the Liberal government passed following the Conservatives victory in 1979. See P.C. 1979-1616, 2 June 1979.
- 14 Referring to the nineteenth-century British cabinet, at a time when there was no secretariat, Jennings reported, "The taking of notes by any minister other than the prime minister was long forbidden. Sir William Molesworth took notes in the Cabinet of Lord Aberdeen, and on one occasion Lord Granville refused to continue a statement until Molesworth laid down his note-book. Lord Derby took notes in Lord Beaconsfield's Government, asserting that he saw

- no objection to temporary notes that were subsequently destroyed. Both Lord Salisbury and Mr. Asquith forbade the taking of notes. The result was that normally there was no record of Cabinet decisions except the prime minister's letter to the sovereign." Jennings, *Cabinet Government*, pp. 269–70. For a recent Canadian exception to the prime minister's usual rule, see Geoffrey Stevens, *The Player: The Life and Times of Dalton Camp* (Toronto: Key Porter Books, 2003), p. 292.
- 15 United Kingdom, Cabinet Office, *Questions of Procedure for Ministers* (London: HMSO, 1992), cited in Peter Hennessy, *The Hidden Wiring: Unearthing the British Constitution* (London: Victor Gollancz, 1995), p. 102. These exact words survived intact in the "Ministerial Code," published for the first time by the Blair administration in 1997, and were reflective of the original advice provided to ministers by Clement Atlee in 1949. See Amy Baker, *Prime Ministers and the Rule Book* (London: Politico's, 2000), pp. 157, 141.
 - 16 Canada, Privy Council Office, *A Guide for Ministers and Secretaries of State* (Ottawa: Public Works and Government Services Canada, 2002), p. 36. This document was published under the authority of Prime Minister Jean Chrétien on 11 June 2002. Beginning in 1974, earlier versions of this document, entitled *Guidance for Ministers*, were provided to ministers on a confidential basis by the Privy Council Office on the instructions of the prime minister.
 - 17 *Attorney-General v. Jonathan Cape Ltd. and Others; Attorney-General v. Times Newspapers Ltd.*, [1975] 3 All England Law Reports Annotated 484 (Court of Queen's Bench). Like Hunt's, Armstrong's defence of the secrecy convention occurred in the context of litigation: "In my opinion it is necessary in the national interest for the proper functioning of government in this country that documents ... relating to the formulation of issues of government policy at the highest level, namely Cabinet committees and Cabinet, should be withheld from production. The importance of confidentiality for the inner workings of government at this level has been widely recognised and I respectfully refer to the observations of Lord Reid in *Conway v. Rimmer*, [1968] 1 All ER 874 at 888, [1968] AC 910 at 952. Since that judgement the confidentiality of cabinet proceedings had been considered by two independent committees, the Franks Committee on section 2 of the Official Secrets Act 1911 (1972) (Cmnd. 5104) and the Radcliffe Committee on ministerial memoirs (1976) (Cmnd. 6386). Both reaffirmed without qualification the importance of preserving the confidentiality of the proceedings in Cabinet and Cabinet committees." See *Air Canada and Others v. Secretary of State for Trade and Another*, [1983] 1 All England Law Reports Annotated 161 at 177–78 (Court of Appeal).
 - 18 See de Smith and Brazier, *Constitutional and Administrative Law*, p. 190.
 - 19 For a generic example of such a mandate letter, see Peter E. Larson, ed., *Changing the Guard: Effective Management of Transitions in Government* (Ottawa: Public Policy Forum, 2001), pp. 46–7.
 - 20 United Kingdom, Committee of Privy Counsellors on Ministerial Memoirs, *Report*, pp. 10, 13. In Canada, it used to be customary to seek the permission of the governor general for an outgoing minister to be released from the privy councillor's oath for the purpose of such explanation, but this appears to have died out – as has the practice of ministers resigning for reasons of principle. As in the United Kingdom, there are rules for the vetting of ministerial memoirs by the Privy Council Office, but since few of these are published the rules appear to operate somewhat haphazardly. See Canada, Privy Council Office, *A Guide for Ministers and Secretaries of State*, p. 44.
 - 21 Lord Hunt of Tanworth, "Access to a previous government's papers," *Public Law* (1982), pp. 517–18.
 - 22 See Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford: Clarendon Press, [1984] 1986), pp. 74–5; Heard, *Canadian Constitutional Conventions*, p. 65. The convention is also briefly described by the Privy Council Office in *A Guide for Ministers and Secretaries of State*, p. 25.
 - 23 Jennings, *Cabinet Government*, p. 274.

- 24 *Air Canada v. Secretary of State for Trade*, at 177.
- 25 Bryce to St. Laurent, 14 June 1957.
- 26 "There are also classes of documents and information which for years have been recognised by the law as entitled in the public interest to be immune from disclosure. In such cases the affidavit or certificate of a Minister is hardly necessary. I refer to such documents as Cabinet minutes." *Rogers v. Secretary of State for the Home Department; Gaming Board for Great Britain v. Rogers*, [1972] 2 All England Law Reports Annotated 1070-71 (House of Lords).
- 27 This was recognized by the Haldane report issued in 1918, two years after the establishment of the British cabinet secretariat. See United Kingdom, Ministry of Reconstruction, Machinery of Government Committee, *Report*, Cd. 9230 (London: HMSO, 1918), pp. 4-5.
- 28 For the numbers of documents, see affidavit of Nicholas d'Ombain, *Oberlander and Attorney General of Canada*, Federal Court of Canada, Trial Division, Court File T-1505-01, 2002.
- 29 Canada, Privy Council Office, *Responsibility in the Constitution*, pp. 41-2.
- 30 See *The Rajah of Coorg v. The East India Company* (1855-1856), 25 The Law Reports 350 (Courts of Chancery).
- 31 Peter Hogg, *Constitutional Law of Canada*, 3rd edition (Toronto: Carswell, 1992), pp. 264-65.
- 32 An early case provided a description of the matters covered: "state papers, despatches, minutes or documents or any such description which relate to the carrying on of the government, and are concerned with the transactions of public affairs." *Hennessy v. Wright* (1888), 21 The Law Reports 509 at 510 (Court of Queen's Bench).
- 33 *Ibid.*, at 515. By the 1930s, the common law began to assert the right of the court to determine the relevance of privileged information and the extent of damage that might result from disclosure. See *Robinson v. State of South Australia* (No. 2), [1931] A.C. 719.
- 34 *Duncan v. Cammell Laird & Co. Ltd.*, [1942] 1 All England Law Reports Annotated 590 (House of Lords).
- 35 *Ibid.*, at 595.
- 36 *In the Matter of a Reference Under the Constitutional Questions Determination Act*, R.S.B.C. 1948, c. 66 and in *the Matter of Regina v. Snider*, [1953-1954] 4 D.L.R. 486 (Supreme Court of Canada).
- 37 Denning's fame rests on his tenure as master of the rolls (judicial head of the Court of Appeal) from 1962 to 1982. First appointed to that court in 1948, he was promoted law lord in 1957, but in 1962 he opted to return to the lower court on account of difficulties with his senior judicial colleague in the House of Lords, Lord Simonds. He had an engagingly simple, direct style of prose.
- 38 *Re Grosvenor Hotel*, [1964] 3 All England Law Reports Annotated 354 at 361-62.
- 39 *Gagnon v. Québec Securities Commission*, [1964] 50 D.L.R. (2d) 334 (Supreme Court of Canada).
- 40 *Conway v. Rimmer*, at 952.
- 41 The reason for the new term was set out by the House of Lords in 1972 by Lord Salmon in describing the scope of Crown privilege: "[T]he Crown ... may intervene to prevent production or disclosure of that which in the public interest ought to be protected. Such an intervention goes under the misleading name of Crown privilege. When a document or information of the kind to which I have referred is in the possession of a government department it is the duty rather than the privilege of the Minister to refuse its disclosure. When such a document is in the possession of a third party, again it is the duty rather than the privilege of the executive through the Attorney-General to intervene in the public interest to prevent its disclosure." *Rogers v. Secretary of State for the Home Department; Gaming Board for Great Britain v. Rogers*, at 1070.
- 42 Federal Court Act, R.S.C. 1970, 2nd Supplement, c. 10. It should be noted that apart from Quebec, the provinces in Canada do not have similar statutes; they are therefore subject to the common law rules of evidence. Quebec's statutory provision is contained in Article 308 of the Code of Civil Procedure. See Hogg, *Constitutional Law of Canada*, p. 264, note 26.

- 43 Canada, Parliament, House of Commons, *Debates and Proceedings (Hansard)*, 28th Parliament, 3rd Session, 29 October 1970 (Ottawa: Queen's Printer, 1970), p. 698.
- 44 *Ibid.*
- 45 Federal Court Act.
- 46 Canada, Secretary of State, Hon. John Roberts, *Legislation on Public Access to Government Documents* (Ottawa: Supply and Services Canada, 1977), p. 4.
- 47 Order-in-Council, P.C. 1977-1911, 6 July 1977.
- 48 Prior to the McDonald Commission, no federal public inquiry had been given access to cabinet papers. In the United Kingdom in the early 1980s, the inquiry into the Falklands war had access to cabinet-level information, as did the Scott Inquiry in the early 1990s into the sale of arms to Iraq. Provincially in Canada, the recent Walkerton Inquiry in Ontario, headed by Justice Dennis O'Connor, asserted that its mandate "constituted a waiver of Cabinet privilege by the province," which had the effect of gaining the commission access to whatever documents it wanted subject to procedures for putting them into evidence. Nevertheless, documentary and oral information about the cabinet's business remain rare exceptions to the general rule of non-disclosure. See Canada, Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police (MacDonald Commission), *Report* (Ottawa: Queen's Printer, 1978); United Kingdom, Committee of Privy Councillors, *Falkland Islands Review*, Cmd. 8787 (London: HMSO, 1983); United Kingdom, Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions (Scott Inquiry), *Report. The Rt. Hon Sir Richard Scott, the Vice Chancellor, Ordered by the House of Commons to be Printed, 15 February 1996* (London: HMSO, 1996); Ontario, Walkerton Commission of Inquiry, *Report: Part One: The Events of May 2000 and Related Issues* (Toronto: Queen's Printer, 2002), pp. 486-87.
- 49 The text is reproduced in "Reasons for Decision of the Commission, October 13, 1978," in Canada, Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police (MacDonald Commission), *Second Report*, Vol. 2, p. 1176.
- 50 Starting in 1984, when John Turner took over from Trudeau, the convention was extended to cover the documents of successive administrations of the same political party. This was a stretch from Bryce's wording based on British practice concerning the protection of one party's cabinet secrets from an opposing party.
- 51 Principally, these were cabinet memoranda, agendas, records of deliberations and decisions, discussion papers, and communications between ministers and briefing papers for ministers related to government policy or decisions. See Section 69(1) of An Act to enact the Access to Information Act and Privacy Act, to amend the Federal Court Act and the Canada Evidence Act, and to amend certain other Acts in consequence thereof, 29-30-31 Eliz. II, c. 111.
- 52 Canada Evidence Act, R.S. 1985, c. C-5, ss. 37, 38
- 53 Ombudsman Act 1976, Commonwealth Consolidated Acts [Australia], Act No. 181
- 54 Administrative Decisions (Judicial Review) Act 1977, Commonwealth Consolidated Acts [Australia], Act No. 59, s. 14
- 55 *Ibid.*
- 56 Administrative Appeals Tribunal Act 1975, Commonwealth Consolidated Acts [Australia], Act No. 91, s. 36
- 57 *Ibid.*
- 58 Freedom of Information Act 1982, Commonwealth Consolidated Acts [Australia], Act No. 3, s. 34
- 59 Auditor-General Act 1997, Commonwealth Consolidated Acts [Australia], Act No. 151, s. 37
- 60 Australian Law Reform Commission, Administrative Review Council, *Open Government: Review of the Commonwealth's Freedom of Information Act 1982, 1995. Report No. 4 (ALRC77)* (Canberra: Australian Government Publishing Service, 1995), Chapter 9, para. 9.7.

- 61 Parliamentary Commissioner Act 1967, Public General Acts [U.K.], Part I 1967, c. 13. See de Smith and Brazier, *Constitutional and Administrative Law*, p. 699.
- 62 Freedom of Information Act 2000, Public General Acts [U.K.], Part III 2000, c. 36, s. 36. The act also contains the interesting provision that the "duty to confirm or deny does not arise in relation to [such] information."
- 63 *Attorney-General v. Jonathan Cape Ltd. and Others; Attorney-General v. Times Newspapers Ltd.*
- 64 *Sankey v. Whitlam and others*, [1978] 21 Australia Law Reports 505 (High Court).
- 65 See *Burmah Oil Co. Ltd. v. Governor and Company of the Bank of England*, [1979] 2 All England Law Reports Annotated 461 (Court of Appeal); *Burmah Oil Co. Ltd. v. Governor and Company of the Bank of England*, [1979] 3 All England Law Reports Annotated 700 (House of Lords).
- 66 *Burmah Oil Co. Ltd. v. Governor and Company of the Bank of England*, House of Lords, [1979] 3 All ER 700.
- 67 *The Honourable Joseph Roberts Smallwood v. F.H. Sparling et al*, [1982] 2 S.C.R. 686 at 704 (Supreme Court of Canada).
- 68 *H. Rod Carey v. Her Majesty the Queen in Right of Ontario, the Ontario Development Corporation, the Northern Ontario Development Corporation, Claude Bennett and Allan Grossman* 1985-1986, [1986] 2 S.C.R. 637 at 659 (Supreme Court of Canada).
- 69 *Ibid.*, at 658, 671.
- 70 *Ibid.*, at 654.
- 71 *Commission des droits de la personne v. Attorney General of Canada et al.*, [1982] 1 S.C.R. 215; (1982), 134 D.L.R. (3rd) 17; 41 N.R. 318, at 222, 224, 229.
- 72 *The Auditor General of Canada v. The Minister of Energy, Mines and Resources, the Minister of Finance, the Deputy Minister of Energy, Mines and Resources and the Deputy Minister of Finance*, [1989] 2 S.C.R. 49; (1989), 61 D.L.R. (4th) 604; 97 N.R. 241. In 1989, the Appeal Division of the Federal Court upheld the finality of a Section 39 certificate and stated that "Crown privilege for Cabinet documents was an established exception to the right to state one's case. There was no denial of due process under section 2(e) of the Bill of Rights." *Canada (Attorney General) v. Central Cartage Co.*, [1990] F.C.A., 109 N.R. 373 at 1.
- 73 *Singh v. Canada (Attorney General)*, [2000] F.C.J. No. 4 (Q.L.) (F.C.A.), para. 10.
- 74 *Ibid.*, para. 16.
- 75 *Ibid.*
- 76 *Ibid.*, para. 23.
- 77 *Ibid.*, para. 28.
- 78 *Ibid.*, paras. 38-39.
- 79 *Babcock v. Canada (Attorney General)*, [2002] SCC 57, File No. 28091, para. 61 (Supreme Court of Canada).
- 80 *Ibid.*, para. 22.
- 81 *Ibid.*, paras. 19, 60.
- 82 *Ibid.*, para. 57. Apparently, the chief justice did not absorb Strayer's scholarship on the matter of the separation of powers not being a fundamental of the Constitution.
- 83 *Ibid.*, para. 61.
- 84 *The Information Commissioner v. The Minister of the Environment and Ethyl Canada Ltd.*, [2001] FCT 277, paras. 41-49.
- 85 *Babcock et al. v. The Attorney General of Canada on behalf of Her Majesty the Queen in Right of Canada and in his capacity as Minister of Justice, the Treasury Board of Canada and the Deputy Minister of Justice*, Supreme Court of British Columbia, Vancouver Registry, Docket No. C963180 [1999], para. 48.
- 86 Canada, Office of the Information Commissioner, *Annual Report, 2000-2001* (Ottawa: Public Works and Government Services Canada, 2001), p. 43ff.
- 87 *Ibid.*, p. 49.
- 88 *Ibid.*, p. 45. For another critical view of the statute law, see Alan W. Mewett, "State secrets in Canada," *The Canadian Bar Review* 63 (1985), p. 376.

- 89 Canada, Access to Information Task Force, *Access to Information: Making it Work for Canadians. Report* (Ottawa: Public Works and Government Services Canada, 2002), pp. 44–7.
- 90 The exceptions are certain Treasury Board documents, including minutes and decisions that are not generally available and yet provide evidence of formal executive actions. The Treasury Board paper system should be overhauled to correct this.
- 91 For an excellent survey (and insight into what could happen if the cabinet's work were held to be justiciable), see M.C. Harris, "The courts and the cabinet: Unfastening the buckle," *Public Law* (1989), pp. 251–96.
- 92 In a 1985 decision, *Operation Dismantle*, the Supreme Court indicated that "Cabinet decisions are reviewable by the Courts under s. 32(1)(a) of the *Charter* and the executive branch of the Canadian government bears a general duty to act in accordance with the dictates of the *Charter*." In addition, the court equated the cabinet with the executive. Although this was an assumption rather than an argument, nevertheless in equating the cabinet with the formal executive (i.e., ministers individually and the governor-in-council), the court has set out an erroneous doctrine that has the potential to undermine the protection afforded to cabinet confidentiality on the ground the cabinet is informal and political rather than formal and executive. See *Operation Dismantle v. Her Majesty the Queen*, [1985] S.C.R. 5. Section 32(1)(a) applies the *Charter* to Parliament and the legislatures and their respective governments as well as to all matters within their authority.
- 93 For the numbers, see Nicholas d'Ombrain, *Oberlander and Attorney General of Canada*, Federal Court of Canada, Trial Division, Court File T-1505-01, 2002.
- 94 For a description, see *The Information Commissioner v. The Minister of the Environment and Ethyl Canada Ltd.*, [2001] FCT 277, paras. 40–43.
- 95 S.I. Bushnell, "Crown privilege," *Canadian Bar Review* 51 (1973), pp. 581–82 (emphasis in the original).
- 96 Donald J. Savoie, *Governing from the Centre: The Concentration of Power in Canadian Politics* (Toronto: University of Toronto Press, 1999), esp. pp. 7, 339.
- 97 Bryce to St. Laurent, 14 June 1957.